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No. 515

No. 15145

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United States
Court of Appeals
for the Ninth Circuit

A. W. HARTWIG and JEFF TINGLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 152)

Appeal from the United States District Court for the District of Montana, Billings Division

No. 15145

United States
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for the Ninth Circuit

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Appellee.

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In Two Volumes

Volume I
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Appeal from the United States District Court for the District of Montana, Billings Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—8-22-56

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Affidavits of:

- Hartwig, A. W. 66
- Hill, Ben S. 87
- Jennings, W. C. 85
- White, H. L. 107

Answer of Defendant Jennings 51

Answer of Defendants Hartwig and Tingle 40

Appeal:

- Bond for Costs on 143, 223
- Certificate of Clerk to Transcript of Record on 148, 318
- Notice of 142, 227
- Order Transmitting Original Files on 147
- Statement of Points on (USCA) 151, 320
- Stipulation Re Record on (DC) 144

Attorneys, Names and Addresses of 154

Bond for Costs on Appeal 143, 223

Certificate of Clerk to Transcript of Record 148, 318

Complaint, Amended 2

INDEX PAGE

Decision and Order Denying Defendants' Motion Filed and Entered November 21, 1951... 141

Decision and Order Denying Motion to Dismiss 36

Decision and Order Granting Motion to Strike and Granting Motion for Summary Judgment 121

Docket Entry of September 26, 1951, Showing Filing and Entering of Order on Motion for Summary Judgment 139

Docket Entry of November 19, 1951, Re Order on Motion for Summary Judgment and Entering Judgment in Favor of Plaintiff..... 141

Excerpt From Defendant's Brief in Reply to Motion for Summary Judgment..... 121

Judgment 223

Motion of Defendants Filed November 16, 1951 139

Motion to Dismiss Amended Complaint 33

Motion to Strike Demand for Jury Trial and Portions of Answers and Motion for Summary Judgment 58

Motion Re Report of Master 203

Notice of 203

Notice of Appeal 142, 227

Objections to Master's Report 161

Ex. A—Brief of Defendants on Hearing Before Master 166

INDEX. PAGE

B—Findings of Fact Requested by Defendants 195
No. 15—Subdivision Information Form... 200
Objections to Proposed Judgment, Defendants 131
Order of the Court Filed January 6, 1956 206
Order on Motion for Summary Judgment 135
Order for Reference of Appointment of Special Master 155
Order Transmitting Original Filed to USCA .. 147
Report of Special Master 156
Statement of Points on Appeal (USCA) 151
Statement of Points and Designation of Record (USCA) 320
Stipulation Re Case No. 13267 226
Stipulation Re Record on Appeal (DC) 144
Stipulation Re Testimony 204
Summons 1
Transcript of Proceedings Before Honorable Charles N. Pray:
September 6, 1951 128
September 26, 1951 132
Transcript of Proceedings Before Special Master January 17 and 18, 1955 230

INDEX PAGE

Witnesses:

Duell, Harry O.
—direct 244, 249
—cross 248
—redirect 249

Hartwig, A. W.
—direct 271
—cross 279
—redirect 287
—recross 289

Hill, Ben S.
—direct 251, 301

Jensen, LeRoy D.
—direct 258

Johnson, Paul M.
—direct 308

Newman, F. J.
—direct 313

Tingle, Jeff
—direct 290
—cross 295
—redirect 300

In the District Court of the United States for the District of Montana, Billings Division

Civil Action File No. 1089

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. HARTWIG, JEFF TINGLE and W. C. JENNINGS,

Defendants.

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon Mr. John B. Tansil, United States Attorney, plaintiff's attorney, whose address is Federal Building, Billings, Montana, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: October 8, 1948.

[Seal] H. H. WALKER,

/s/ By ELIZABETH C. McKEE,

Deputy Clerk.

Return on Service of Writ attached.

[Endorsed]: Filed October 12, 1948.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Count I.

Plaintiff alleges that:

1. Jurisdiction of this action is conferred upon this Court by Section 301 of the Second War Powers Act, as amended, (50 U.S.C.A., App. Sec. 633), Section 7(c) of the Veterans' Emergency Housing Act of 1946 (60 Stat. 207, 50 U,S.C.A., App. Sec. 1821 et seq.), and Section 24 of the Judicial Code (54 Stat. 143, 28 U.S.C.A. 41).

2. The defendants herein A. W. Hartwig, Jeff Tingle and W. C. Jennings are residents of the City of Billings, County of Yellowstone, State and District of Montana, and that the transactions constituting the violations alleged in this complaint occurred within the Billings Division of the above-entitled court.

3. Pursuant to the provisions of Title III of the Second War Powers Act, as amended (56 Stat. 176, 50 U.S.C.A., App. Sec. 631 et seq.), and Executive Orders thereunder, the Civilian Production Administration issued Priorities Regulation 33 (11 F.R. 601, 4085). The Housing Expediter, pursuant to the Veterans' Emergency Housing Act of 1946, issued Housing Expediter Priorities Order 1 (11 F.R. 9507) which delegated to the Civilian Production Administration powers and authority conferred upon the Housing Expediter by sections 4 and 7 of said Act. The Civilian Production Administration exercised said delegation of authority in the issuance of an Amendment of Schedule A to Priorities

Regulation 33 dated August 27, 1946, and said Regulation was thus continued in effect under both the Veterans' Emergency Housing Act of 1946 and the Second War Powers Act. By Executive Order 9836, the functions and authority of the Civilian Production Administration with respect to the Veterans' Emergency Housing Program were transferred to the Housing Expedifer. Further, by Housing Expediter Priorities Order 5 (12 F.R. 2111), and Executive Order 9836 (12 F.R. 1939) the Housing Expediter adopted, ratified, confirmed and continued in effect said Priorities Regulation 33, and that said Regulation has been in effect at all times material to this action.

4. Plaintiff brings this action to enforce compliance with the Second War Powers Act, as amended, the Veterans' Emergency Housing Act of 1946, and regulations issued thereunder.

5. Section 944.54(e) of said Priorities Regulation 33 provides that a builder who obtains authorization and priorities assistance to construct a dwelling under said Regulation must construct said dwelling in accordance with the description and specifications contained in the approved application.

6. Pursuant to the provisions of said Priorities Regulation 33, as amended, said defendants, and each of them, applied for and received authorization for priorities assistance from the plaintiff to construct twenty-seven (27) dwellings in the Calhoun Lane Subdivision at or near Billings in Yellowstone County, Montana; such authorization for priorities assistance was obtained through the Fed-

eral Housing Administration, an agency of the plaintiff, on or about the 1st day of March, 1946, and was at the special instance and request of the defendants, and each of them, renewed on or about the 11th day of May, 1946. The maximum sales price of said dwellings established pursuant to the issuance of and authorization for priorities assistance was established at the sum of $6,000.00 for each dwelling; on or about the 10th day of October, 1946, the plaintiff, acting through the Federal Housing Administration, authorized an increase of said maximum sales price and established the same at the sum of $6,465.00 for each dwelling, and on or about the 11th day of November, 1946, the plaintiff, acting by and through the Federal Housing Administration and upon application of the defendants, and each of them, authorized and established a maximum sales price of $8,000.00 for each dwelling for which priorities assistance had been granted to said defendants; that said maximum sales price so established was established upon the basis of express representations made by the defendants, and each of them, to the Federal Housing Administration acting by and on behalf of the plaintiff, such express representations, among other things, being plans, specifications and descriptions of said dwellings; said defendants, and each of them, further represented that said maximum sales price so established by the plaintiff, acting by and through its agent, Federal Housing Administration, did include all special improvements, including but not limited to sanitary sewers, water mains, concrete curbs,

gutters and street paving and Pursuant to Priorities Regulation 33 the maximum sales price so established by the plaintiff acting by and through its agent was required to include all such improvements, and such maximum sales price of $8,000.00 for each of the twenty-seven (27) dwellings in the Calhoun Lane Subdivision near Billings, Montana, was thereby duly established and approved under Project Serial Number 6-093-269.

7. The defendants used Project Serial Number 6-093-269 to obtain building materials actually used in the construction of the said dwellings.

8. After the date of issuance of said authorizations and priorities assistance and during the time that Priorities Regulation 33 remained in effect, defendants constructed and sold 25 dwellings so authorized, and violated the said Acts and Regulation by failing to construct said dwellings in accordance with the plans and specifications contained in the application approved by the Federal Housing Administration, as set out in Exhibit A, attached hereto and made a part hereof.

9. The defendants have been unjustly enriched and purchasers of the dwellings constructed as aforesaid have been deprived of things of value to which they were entitled, as a result of the substitutions and omissions of features of construction and items of equipment set out in Exhibit A, attached hereto and made a part hereof.

Count II.

10. The allegations of Paragraph 1, 2, 3, 4, 6 and 7 are realleged and incorporated herein and

made a part hereof, the same as if fully rewritten herein.

11. Section 944.54(g) of said Priorities Regulation 33 provides that no person may sell any dwelling built under said Regulation for more than the approved maximum sales price.

12. After the date of issuance of said authorizations and priorities assistance and during the time that Priorities Regulation 33 remained in effect, defendants constructed and sold 25 dwellings so authorized, and violated the said Acts and Regulations by selling 9 of the said dwellings at prices in excess of the maximum sales prices approved by the Federal Housing Administration, as set out in Exhibit A, attached hereto and made a part hereof.

13. Thereafter, on or about Septembmer 18, 1946, having failed to construct water mains, sewers, concrete curbs and gutters in accordance with the plans and specifications filed with the Federal Housing Administration under the aforesaid Project Serial Number 6-093-269, the defendants petitioned the Board of County Commissioners of Yellowstone County, Montana, to create a special improvement district for the construction of water mains, sewers, concrete curbs, gutters and oil mix pavement. On or about November 8, 1946 said special improvement district, designated as Rural Special Improvement District No. 73, for water mains, sewers, concrete curbs, gutters and oil mix pavement were approved and constructed pursuant to a contract entered into with the Board of County Commissioners of Yellowstone County by A. W. Hartwig Construction Company. Thereafter, on or about July 28, 1947, the

Board of County Commissioners of Yellowstone County, Montana, issued its resolution making the payment for construction of said Special Improvement District No. 73 a lien against all of the property in the said district; and on the same date the A. W. Hartwig Construction Company was paid for said construction by the issuance of bonds against the said district. Thereafter, the purchasers of the 25 dwellings built by the defendants under Project Serial No. 6-093-269 were informed and advised by the County Assessor of Yellowstone County that their homes were subject to a special improvement tax lien in the sum set out in Exhibit A, attached hereto and made a part hereof.

14. By reason of the foregoing, the defendants have been unjustly enriched by the over-ceiling prices which the purchasers were compelled to pay for such dwellings, and by causing the purchasers to be required to pay the cost of the construction of said Special Improvement District No. 73, in excess of the maximum sales prices approved by the Federal Housing Administration for the said dwellings.

15. Wherefore, plaintiff prays that this Court grant relief as follows:

1. A mandatory injunction and order directing the defendants to complete the construction of the dwellings herein referred to in accordance with and pursuant to the plans, specifications and descriptions submitted by the defendants to the Federal Housing Administration, or, in the event that said defendants fail to, or are unable so to do, that the value of the non-conformity of said dwellings to

said plans, specifications and descriptions be awarded to each purchaser named in Exhibit A.

2. A mandatory injunction and order directing the defendants to restore to the purchasers named in Exhibit A of direct overcharges demanded and received by the defendants in the sale of the dwellings at prices in excess of the approved maximum sales prices.

3. A mandatory injunction and order directing the defendants to make restitution to each of the purchasers named in Exhibit A by paying and satisfying the special improvement levy or tax made by the County of Yellowstone, Montana, as against each of said dwellings; or in the alternative, by paying the amounts of such tax liens to the purchasers named in Exhibit A, attached hereto and made a part hereof.

4. The costs of this action and such other relief as may be just and equitable.

/s/ JOHN B. TANSIL,
Attorney of the United States, in and for the District of Montana.

/s/ HARLOW PEASE,
Assistant Attorney of the United States, in and for the District of Montana.

/s/ FRANKLIN A. LAMB,
Assistant Attorney of the United States, in and for the District of Montana.

/s/ EMMETT C. AUGLAND,
Assistant Attorney of the United States, in and for the District of Montana.

EXHIBIT A—Page 1

Name of Purchaser: Anderson, Swan C. Address: 112 Arden, Lot 17, Block 2, Date of Sale: 5-27-47.

Maximum Sales Price	$8,000.00
Actual Sales Price	$9,175.49
Direct Overcharge	None
Special Improvement Lien and Interest	$1,175.49
Total Overcharges	$1,175.49

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$ 291.00
Garage foundations to be total of 24" in depth	137.00
FRAMING	
All roof rafters to be spaced 16" center to center	87.30
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	10.00
Garage studs to be 2"x4" lumber	1.80
CABINET WORK	
Utility room closet to be built	55.00
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
Garage light and switch to be installed	10.00
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	23.43
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
GRADING, WALKS, DRIVEWAY	
Driveway to be 8'0" overall in width	18.25
Sidewalks to be 3'0" wide	3.75
Top soil for finish grading to be furnished	134.00
Total	$1,010.33

EXHIBIT A—Page 2

Name of Purchaser: Apps, Leonard O., et ux. Address: 125 Bruce, Lot 8, Block 2. Date of Sale: 5-29-47.

Maximum Sales Price	$8,000.00	
Actual Sales Price	$9,230.00	
Direct Overcharge		$0,055.00
Special Improvement Lien and Interest		$1,175.49
Total Overcharges		$1,230.49

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$269.00
Garage foundations to be total of 24" in depth	67.33
FRAMING	
All roof rafters to be spaced 16" center to center	90.00
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	10.00
STORM DOORS AND SCREENS	
Storm doors to be installed, front and rear	20.00
Storm windows to be installed, all windows	226.87
CABINET WORK	
Towel closet to be built in bathroom	28.00
Two china closets in kitchen	25.00
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
3 wall outlets to be installed in kitchen	12.00
Light to be installed over rear door	15.00
Rear door bell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	24.20
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
Railings to be installed on front porch	10.80
GRADING, WALKS, DRIVEWAY	
Driveway to be 8'0" overall in width	10.00
Sidewalk to be 3'0" wide	.75
Top soil for finish grading to be furnished	141.00
Total	$1,188.75

EXHIBIT A—Page 3

Name of Purchaser: Bahn, E. R., et ux. Address: 121 Bruce, Lot 6, Block 2. Date of Sale: 4-7-47.

Maximum Sales Price	$8,000.00	
Actual Sales Price	$9,230.49	
Direct Overcharges		$ 55.00
Special Improvement Lien and Interest		1,175.49
Total Overcharges		$1,230.49

CONSTRUCTION DEFECTS AND OMISSIONS

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$269.00
Garage foundations to be total of 24" in depth	67.33
FRAMING	
All roof rafters to be spaced 16" center to center	90.00
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	10.00
STORM DOORS AND SCREENS	
Storm doors to be installed, front and rear	20.00
Storm windows to be installed, all windows	226.87
CABINET WORK	
Towel closet to be built in bathroom	28.00
Broom closet to be built in kitchen	30.00
Two china closets in kitchen	25.00
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace pipe to have double wall construction	10.60
ELECTRICAL WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
3 wall outlets to be installed in kitchen	12.00
Light to be installed over rear door	15.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	24.20
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
Railings to be installed on front porch	10.80
GRADING, WALKS, DRIVEWAY	
Driveways to be 8'0" overall in width	10.00
Sidewalks to be 3'0" wide	.75
Top soil for finish grading to be furnished	141.00
Total	$1,218.75

EXHIBIT A—Page 4

Name of Purchaser: Bailey, R. R., et. ux. Address: 116 Bruce, Lot 4, Block 3. Date of Sale: 5-20-47.

Maximum Sales Price	$8,000.00	
Actual Sales Price	$9,220.42	
Direct Overcharge		$0,055.00
Special Improvement Lien and Interest		$1,165.42
Total Overcharges		$1,220.42

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$269.00
Garage foundations to be total of 24" in depth	67.33
FRAMING	
All roofs rafters to be spaced 16" center to center	90.00
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	10.00
STORM DOORS AND SCREENS	
Storm doors to be installed, front and rear	40.00
Storm windows to be installed, all windows	226.87
CABINET WORK	
Towel closet to be built in bathroom	28.00
Broom closet to be built in kitchen	30.00
Two china closets in kitchen	50.00
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
3 wall outlets to be installed in kitchen	12.00
Light to be installed over rear door	15.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	24.20
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
Railings to be installed on front porch	10.80
GRADING, WALKS, DRIVEWAY	
Driveway to be 8'0" overall in width	10.00
Sidewalks to be 3'0" wide	.75
Top soil for finish grading to be furnished	141.00
Total	$1,263.75

EXHIBIT A—Page 5

Name of Purchaser: Derden, J. R., et ux. Address: 113 Bruce, Lot 2, Block 2. Date of Sale: 5-26-47.

Maximum Sales Price	$8,000.00	
Actual Sales Price	$9,230.49	
Direct Overcharge		$0,055.00
Special Improvement Lien and Interest		$1,175.49
Total Overcharges		$1,230.49

CONSTRUCTION DEFECTS AND OMISSIONS

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$269.00
Garage foundations to be total of 24" in depth	67.33
FRAMING	
All roof rafters to be spaced 16" center to center	90.00
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	10.00
STORM DOORS AND SCREENS	
Storm doors to be installed, front and back	40.00
Storm windows to be installed, all windows	226.87
CABINET WORK	
Towel closet to be built in bathroom	28.00
Broom closet to be built in kitchen	30.00
Two china closets in kitchen	25.00
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
3 wall outlets to be installed in kitchen	12.00
Light to be installed over rear door	15.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	24.20
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
Railings to be installed on front porch	10.80
GRADING, WALKS, DRIVEWAY	
Driveway to be 8'0" overall in width	10.00
Sidewalk to be 3'0" wide	.75
Top soil for finish grading to be furnished	141.00
Total	$1,238.75

EXHIBIT A—Page 6

Name of Purchaser: Crutcher, W. A., et ux. Address: 127 Bruce, Lot 9, Block 2. Date of Sale: 3-18-47.

Maximum Sales Price	$8,000.00
Actual Sales Price	$9,175.49
Direct Overcharge	None
Special Improvement Lien and Interest	$1,175.49
Total Overcharges	$1,175.49

CONSTRUCTION DEFECTS AND OMISSIONS

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$269.00
Garage foundations to be a total of 24" in depth	67.33
FRAMING	
All roof rafters to be spaced 16" center to center	90.00
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	10.00
STORM DOORS AND SCREENS	
Storm doors to be installed, front and rear	20.00
Storm windows to be installed, all windows	226.87
CABINET WORK	
Towel closet to be built in bathroom	28.00
Broom closet to be built in kitchen	30.00
Two china closets in kitchen	25.00
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
3 wall outlets to be installed in kitchen	12.00
Light to be installed over rear door	15.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	24.20
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
Railings to be installed on front porch	10.80
GRADING, WALKS, DRIVEWAY	
Sidewalks to be 3'0" wide	.75
Top soil for finish grading to be furnished	141.00
Total	$1,208.75

EXHIBIT A—Page 7

Name of Purchaser: Harma, Alva A., et. ux. Address: 111 Bruce, Lot 1, Block 2. Date of Sale: 4-21-47.

Maximum Sales Price	$8,000.00
Actual Sales Price	$9,175.49
Direct Overcharge	None
Special Improvement Lien and Interest	$1,175.49
Total Overcharges	$1,175.49

CONSTRUCTION DEFECTS AND OMISSIONS

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$300.80
Garage foundations to betotal of 24" in depth	137.00
FRAMING	
All roof rafters to be spaced 16" center to center	87.30
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	10.20
Garage studs to be 2"x4" lumber	1.80
STORM DOORS AND SCREENS	
Storm doors to be installed, front and rear	20.00
Storm windows to be installed, all windows	206.00
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside silleocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
Hall light and wall light switch to be installed	12.00
Garage light switch to be installed	10.00
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	23.41
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
Railings to be installed on front porch	10.80
GRADING, WALKS, DRIVEWAY	
Driveway to be 8'0" overall in width	13.25
Sidewalks to be 3'0" wide	3.75
Top soil for finish grading to be furnished	134.00
Total	$1,214.11

EXHIBIT A—Page 8

Name of Purchaser: Hodge, Roy W., et. ux. Address: 123 Bruce, Lot 7, Block 2. Date of Sale: 4-9-47.

Maximum Sales Price	$8,000.00
Actual Sales Price	$9,175.49
Direct Overcharge	None
Special Improvement Lien and Interest	$1,175.49
Total Overcharge	$1,175.49

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$269.00
Garage foundations to be total of 24" in depth	67.33
FRAMING	
All roof rafters to be spaced 16" center to center	90.00
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	10.00
STORM DOORS AND SCREENS	
Storm doors to be installed, front and rear	20.00
Storm windows to be installed, all windows	226.87
CABINET WORK	
Towel closet to be built in bathroom	28.00
Broom closet to be built in kitchen	30.00
Two china closets in kitchen	25.00
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
3 wall outlets to be installed in kitchen	12.00
Light to be installed over rear door	15.00
Rear doorbell installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	24.20
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
GRADING, WALKS, DRIVEWAY	
Sidewalks to be 3'0" wide	.75
Top soil for finish grading to be furnished	141.00
Total	$1,197.95

EXHIBIT A—Page 9

Name of Purchaser: Hutchens, Ivan F., et ux. Address: 116 Arden, Lot 15, Block 2. Date of Sale: 5-20-47.

Maximum Sales Price	$8,000.00	
Actual Sales Price	$9,175.49	
Direct Overcharge		None
Special Improvement Lien and Interest		$1,175.49
Total Overcharges		$1,175.49

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$269.00
Garage foundations to be total of 24" in depth	67.33
FRAMING	
All roof rafters to be spaced 16" center to center	90.00
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	10.00
Garage studs to be 2"x4" lumber	1.80
STORM DOORS AND SCREENS	
Storm doors to be installed, front and rear	20.00
Storm windows to be installed, all windows	226.87
CABINET WORK	
Broom closet to be built in kitchen	30.00
Two china closets in kitchen	25.00
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used in bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
Hall light and wall light switch to be installed	12.00
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
3 wall outlets to be installed in kitchen	12.00
Light to be installed over rear door	15.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	24.20
GRADING, WALKS, DRIVEWAY	
Driveway to be 8'0" overall in width	10.00
Sidewalks to be 3'0" wide	.75
Top soil for finish grading to be furnished	141.00
Total	$1,164.05

EXHIBIT A—Page 10

Name of Purchaser: Jensen, Le Roy D., et. ux. Address: 110 Arden, Lot 18, Block 2. Date of Sale: 2-27-47.

Maximum Sales Price	$8,000.00
Actual Sales Price	$9,175.49
Direct Overcharge	None
Special Improvement Lien and Interest	$1,175.49
Total Overcharges	$1,175.49

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$291.00
Garage foundations to be total of 24" in depth	137.00
FRAMING	
All roof rafters to be spaced 16" center to center	87.30
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	10.00
Garage studs to be 2"x4" lumber	1.80
STORM DOORS AND SCREENS	
Storm windows to be installed, all windows	247.50
CABINET WORK	
Utility room closet to be built	55.00
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
Garage light and switch to be installed	10.00
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	23.43
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
Railings to be installed on front porch	10.80
GRADING, WALKS, DRIVEWAY	
Driveway to be 8'0" overall in width	18.25
Sidewalks to be 3'0" wide	3.75
Top soil for finished grading to be furnished	134.00
Total	$1,268.63

EXHIBIT A—Page 11

Name of Purchaser: Kuhne, Charles, et. ux. Address: 122 Arden, Lot 12, Block 2. Date of Sale: 5-23-47.

Maximum Sales Price	$8,000.00	
Actual Sales Price	$9,180.49	
Direct Overcharge		$0,005.00
Special Improvement Lien and Interest		$1,175.49
Total Overcharges		$1,180.49

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$269.00
Garage foundations to be total of 24" in depth	67.33
FRAMING	
All roof rafters to be spaced 16" center to center	90.00
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	10.00
STORM DOORS AND SCREENS	
Storm doors to be installed, front and rear	20.00
Storm windows to be installed, all windows	226.87
CABINET WORK	
Towel closet to be built in bathroom	28.00
Broom closet to be built in kitchen	30.00
Two china closets in kitchen	25.00
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRICAL WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
Hall light and wall light switch to be installed	12.00
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
3 wall outlets to be installed in kitchen	12.00
Light to be installed over rear door	15.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	24.20
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
GRADING, WALKS, DRIVEWAY	
Driveway to be 8'0" overall in width	10.00
Sidewalks to be 3'0" wide	.75
Top soil for finish grading to be furnished	141.00
Total	$1,219.95

EXHIBIT A—Page 12

Name of Purchaser: Marquardt, A. R., et. ux. Address: 122 Bruce, Lot 7, Block 3. Date of Sale: 6-17-47.

Maximum Sales Price	$8,000.00
Actual Sales Price	$9,156.90
Direct Overcharge	None
Special Improvement Lien and Interest	$1,156.90
Total Overcharges	$1,156.90

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$269.00
Garage foundations to be total of 24" in depth	67.33
FRAMING	
All roof rafters to be spaced 16" center to center	90.00
Collar beams (ties, 1"x8") to be spaced between roof rafters	10.00
STORM DOORS AND SCREENS	
Storm doors to be installed, front and rear	20.00
Storm windows to be installed, all windows	226.87
CABINET WORK	
Towel closet to be built in bathroom	28.00
Broom closet to be built in kitchen	30.00
Two china closets in kitchen	25.00
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
3 wall outlets to be installed in kitchen	12.00
Light to be installed over rear door	15.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	24.20
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
Railings to be installed on front porch	10.80
GRADING, WALKS, DRIVEWAY	
Driveway to be 8'0" overall in width	10.00
Sidewalks to be 3'0" wide	.75
Top soil for finish grading to be furnished	141.00
Total	$1,218.75

EXHIBIT A—Page 13

Name of Purchaser: McGinnis, R. B., et. ux. Address: 124 Bruce, Lot 8, Block 3. Date of Sale: 4-22-47.

Maximum Sales Price	$8,000.00
Actual Sales Price	$9,154.07
Direct Overcharge	None
Special Improvement Lien and Interest	$1,154.07
Total Overcharges	$1,154.07

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$273.80
Garage foundations to be total of 24" in depth	137.00
FRAMING	
All roof rafters to be spaced 16" center to center	102.80
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	8.00
Garage studs to be 2"x4" lumber	1.80
STORM DOORS AND SCREENS	
Storm doors to be installed, front and rear	20.00
Storm windows to be installed, all windows	268.30
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
Fireplace chimney to be properly vented	12.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
Garage light and switch to be installed	10.00
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwell bats to be placed in ceiling	26.50
SHUTTERS AND PORCH RAILINGS	
Shutter to be installed at front windows	20.00
GRADING, WALKS, AND DRIVEWAY	
Driveway to be 8'0" overall in width	18.25
Sidewalks to be 3'0" wide	3.75
Top soil for finish grading to be furnished	132.00
Total	$1,253.00

EXHIBIT A—Page 14

Name of Purchaser: Newman, F. J., et. u: Address: 117 Bruce, Lot 4, Block 2. Date of Sale: 3-25-47.

Maximum Sales Price	$8,000.00
Actual Sales Price	$9,175.49
Direct Overcharge	None
Special Improvement Lien and Interest	$1,175.49
Total Overcharges	$1,175.49

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$273.80
Garage foundations to be total of 24" in depth	137.00
FRAMING	
All roof rafters to be spaced 16" center to center	102.80
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	8.00
Garage studs to be 2"x4" lumber	1.80
STORM DOORS AND SCREENS	
Storm windows to be installed, all windows	268.30
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
Garage light and switch to be installed	10.00
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	26.50
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
GRADING, WALKS, DRIVEWAY	
Driveway to be 8'0" overall in width	18.25
Sidewalks to be 3'0" wide	3.75
Top soil for finish grading to be furnished	132.00
Total	$1,221.00

EXHIBIT A—Page 15

Name of Purchaser: Noyes, Leonard W., et. ux. Address: 126 Arden, Lot 10, Block 2. Date of Sale: 3-18-47.

Maximum Sales Price	$8,000.00	
Actual Sales Price	$9,230.49	
Direct Overcharge		$0,055.00
Special Improvement Lien and Interest		$1,175.49
Total Overcharges		$1,230.49

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$300.80
Garage foundations to be total of 24" in depth	137.00
FRAMING.	
All roof rafters to be spaced 16" center to center	87.30
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	10.20
Garage studs to be 2"x4" lumber	1.80
STORM DOORS AND SCREENS	
Storm windows to be installed all windows	206.00
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
Garage light and switch to be installed	10.00
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	23.41
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
GRADING, WALKS, DRIVEWAY	
Driveway to be 8'0" overall in width	18.25
Sidewalks to be 3'0" wide	3.75
Top soil for finish grading to be furnished	134.00
Total	$1,171.31

EXHIBIT A—Page 16

Name of Purchaser: Nickerson, John H., et. ux. Address: 114 Arden, Lot 16, Block 2. Date of Sale: 2-8-47.

Maximum Sales Price	$8,000.00
Actual Sales Price	$9,175.49
Direct Overcharge	None
Special Improvement Lien and Interest	$1,175.49
Total Overcharges	$1,175.49

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$309.00
Garage foundations to be total of 24" in depth	137.00
FRAMING	
All roof rafters to be spaced 16" center to center	95.80
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	8.40
Garage studs to be 2"x4" lumber	1.80
STORM DOORS AND SCREENS	
Storm windows to be installed, all windows	247.50
CABINET WORK	
Towel closet to be built in bathroom	28.00
Utility room closet to be built	55.00
PLUMBING AND HEATING	
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
Garage light and switch to be installed	10.00
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	25.75
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
GRADING, WALKS, DRIVEWAY	
Driveway to be 8'0" overall in width	18.25
Sidewalks to be 3'0" wide	3.75
Top soil for finish grading to be furnished	133.00
Total	$1,262.25

EXHIBIT A—Page 17

Name of Purchaser: Potter, N. A., et. ux. Address: 114 Bruce, Lot 3, Block 3. Date of Sale: 5-27-47.

Maximum Sales Price	$8,000.00
Actual Sales Price	$9,168.02
Direct Overcharge	None
Special Improvement Lien and Interest	$1,168.02
Total Overcharges	$1,168.02

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$300.80
Garage foundations to be total of 24" in depth	137.00
FRAMING	
All roof rafters to be spaced 16" center to center	87.30
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	10.20
Garage studs to be 2"x4" lumber	1.80
STORM DOORS AND SCREENS	
Storm doors to be installed, front and rear	20.00
Storm windows to be installed, all windows	206.00
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
Hall light and wall light switch to be installed	12.00
Garage light and switch to be installed	10.00
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	23.41
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
Railings to be installed on front porch	10.80
GRADING, WALKS, DRIVEWAY	
Driveway to be 8'0" overall in width	18.25
Sidewalks to be 3'0" wide	3.75
Top soil for finish grading to be furnished	134.00
Total	$1,214.11

EXHIBIT A—Page 18

Name of Purchaser: Price, Merle R., et. ux. Address: 118 Arden, Lot 14, Block 2. Date of Sale: 3-19-47.

Maximum Sales Price	$8,000.00	
Actual Sales Price	$9,230.49	
Direct Overcharge		$0,055.00
Special Improvement Lien and Interest		$1,175.49
Total Overcharges		$1,230.49

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS.	
House foundations to be 44" in depth from top of footing	$269.00
Garage foundations to be total of 24" in depth	67.33
FRAMING	
All roof rafters to be spaced 16" center to center	90.00
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	10.00
STORM DOORS AND SCREENS	
Storm doors to be installed, front and rear	20.00
Storm windows to be installed, all windows	226.87
CABINET WORK	
Towel closet to be built in bathroom	28.00
Broom closet to be built in kitchen	30.00
Two china closets in kitchen	25.00
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" sbil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
3 wall outlets to be installed in kitchen	12.00
Light to be installed over rear door	15.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	24.20
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
GRADING, WALKS, DRIVEWAY	
Driveway to be 8'0" overall in width	10.00
Sidewalks to be 3'0" wide	.75
Top soil for finish grading to be furnished	141.00
Total	$1,207.95

EXHIBIT A—Page 19

Name of Purchaser: Scott, Jimmie. Address: 110 Bruce, Lot 1, Block 3. Date of Sale: 4-22-47.

Maximum Sales Price	$8,000.00
Actual Sales Price	$9,174.08
Direct Overcharges	None
Special Improvement Lien and Interest	$1,174.08
Total Overcharges	$1,174.08

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$309.20
Garage foundations to be total of 24" in depth	137.00
FRAMING	
All roof rafters to be spaced 16" center to center	95.80
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	8.40
Garage studs to be 2"x4" lumber	1.80
STORM DOORS AND SCREENS	
Storm winodws to be installed, all windows	247.50
CABINET WORK	
Towel closet to be built in bathroom	28.00
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
Garage light and switch to be installed	10.00
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	25.75
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
Railings to be installed on front porch	10.80
GRADING, WALKS, DRIVEWAY	
Sidewalks to be 3'0" wide	3.75
Top soil for finish grading to be furnished	133.00
Total	$1,249.80

EXHIBIT A—Page 20

Name of Purchaser: Stearns, R. M., et. ux. Address: 120 Arden, Lot 13, Block 2. Date of Sale: 6-5-47.

Maximum Sales Price	$8,000.00
Actual Sales Price	$9,175.49
Direct Overcharge	None
Special Improvement Lien and Interest	$1,175.49
Total Overcharges	$1,175.49

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$269.00
Garage foundations to be total of 24" in depth	67.33
FRAMING	
All roof rafters to be spaced 16" center to center	90.00
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	10.00
STORM DOORS AND SCREENS	
Storm doors to be installed, front and rear	20.00
Storm windows to be installed, all windows	226.87
CABINET WORK	
Towel closet to be installed in bathroom	28.00
Broom closet to be built in kitchen	30.00
Two china closets in kitchen	25.00
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
Hall light switch and light to be installed	12.00
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
3 wall outlets to be installed in kitchen	12.00
Light to be installed over rear door	15.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	24.20
SHUTTERS AND RAILINGS	
Shutters to be installed at front windows	20.00
GRADING, WALKS, DRIVEWAYS	
Driveway to be 8'0" overall in width	10.00
Sidewalks to be 3'0" wide	.75
Top soil for finish grading to be furnished	141.00
Total	$1,219.95

EXHIBIT A—Page 21

Name of Purchaser: Studer, Louis P., et. ux. Address: 119 Bruce, Lot 5, Block 2. Date of Sale: 5-26-47.

Maximum Sales Price	$8,000.00
Actual Sales Price	$9,175.49
Direct Overcharge	None
Special Improvement Lien and Interest	$1,175.49
Total Overcharges	$1,175.49

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$273.80
Garage foundations to be total of 24" in depth	137.00
FRAMING	
All roof rafters to be spaced 16" center to center	102.80
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	8.00
Garage studs to be 2"x4" lumber	1.80
STORM DOORS AND SCREENS	
Storm doors to be installed, front and rear	20.00
Storm windows to be installed, all windows	268.30
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
Fireplace chimney to be properly vented	12.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
Garage light and switch to be installed	10.00
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	26.50
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
GRADING, WALKS, DRIVEWAY	
Driveway to be 8'0" overall in width	18.25
Sidewalks to be 3'0" wide	3.75
Top soil for finish grading to be furnished	132.00
Total	$1,253.00

EXHIBIT A—Page 22

Name of Purchaser: Wade, John C., et. ux. Address: 120 Bruce, Lot 6, Block 3. Date of Sale: 4-18-47.

Maximum Sales Price	$8,000.00	
Actual Sales Price	$9,214.75	
Direct Overcharge		$0,055.00
Special Improvement Lien and Interest		$1,159.75
Total Overcharges		$1,214.75

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$273.80
Garage foundations to be total of 24" in depth	137.00
FRAMING	
All roof rafters to be spaced 16" center to center	102.80
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	8.00
Garage studs to be 2"x4" lumber	1.80
STORM DOORS AND SCREENS	
Storm windows to be installed, all windows	268.30
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
Fireplace chimney to be properly vented	12.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
Garage light and switch to be installed	10.00
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	26.50
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
GRADING, WALKS, DRIVEWAY	
Driveway to be 8'0" overall in width	18.25
Sidewalks to be 3'0" wide	3.75
Top soil for finish grading to be furnished	132.00
Total	$1,233.00

EXHIBIT A—Page 23

Name of Purchaser: Walter, Howard A., et. ux. Address: 115 Bruce, Lot 3, Block 2. Date of Sale: 4-19-47.

Maximum Sales Price	$8,000.00	
Actual Sales Price	$9,230.49	
Direct Overcharge		$0,055.00
Special Improvement Lien and Interest		$1,175.49
Total Overcharges		$1,230.49

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$269.00
Garage foundations to be total of 24" in depth	67.33
FRAMING	
All roof rafters to be spaced 16" center to center	90.00
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	10.00
STORM DOORS AND SCREENS	
Storm doors to be installed, front and rear	20.00
Storm windows to be installed, all windows	226.87
CABINET WORK	
Towel closet to be built in bathrooms	28.00
Broom closet to be built in kitchens	30.00
Two china closets in kitchen	25.00
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
3 wall outlets to be installed in kitchen	12.00
Light to be installed over rear door	15.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	24.20
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
GRADING, WALKS, DRIVEWAY	
Driveway to be 8'0" overall in width	10.00
Sidewalks to be 3'0" wide	.75
Top soil for finish grading to be furnished	141.00
Total	$1,207.95

EXHIBIT A—Page 24

Name of Purchaser: Watne, Roy N., et. ux. Address: 118 Bruce, Lot 5, Block 3. Date of Sale: 4-9-47.

Maximum Sales Price	$8,000.00
Actual Sales Price	$9,162.60
Direct Overcharge	None
Special Improvement Lien and Interest	$1,162.60
Total Overcharges	$1,162.60

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$273.80
Garage foundations to be total of 24" in depth	137.00
FRAMING	
All roof rafters to be spaced 16" center to center	102.80
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	8.00
Garage studs to be 2"x4" lumber	1.80
STORM DOORS AND SCREENS	
Storm windows to be installed, all windows	268.30
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
Garage light and switch to be installed	10.00
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	26.50
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
GRADING, WALKS, DRIVEWAY	
Sidewalks to be 3'0" wide	3.75
Top soil for finish grading to be furnished	132.00
Total	$1,202.75

[Endorsed]: Filed December 16, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendants respectfully move the court to dismiss the action and the amended complaint of the plaintiff herein, because

1. The amended complaint in the (a) first count thereof and (b) second count thereof fails to state a claim against the defendants, or any of them, upon which relief can be granted.

2. The amended complaint in the (a) first count thereof and (b) second count thereof fails to show that the plaintiff is entitled to an injunction against the defendants, or any of them, whether mandatory or prohibitory, or to any relief, whatsoever, of an equitable nature.

3. The amended complaint in the (a) first count thereof, and (b) second count thereof, is without equity.

4. The amended complaint in the (a) first count thereof and (b) second count thereof, shows on its face any rights of the plaintiff as asserted in the (a) first count aforesaid, or (b) second count thereof, are stale and therefore at this time unenforceable.

5. The amended complaint in the (a) first count thereof and (b) second count thereof shows on its face the plaintiff is not in any case the real party in interest, but that to the contrary the persons named as purchasers in Exhibit A to the amended complaint annexed are one, each and all the real parties in interest in any action brought and here

EXHIBIT A—Page 24

Name of Purchaser: Watne, Roy N., et. ux. Address: 118 Bruce, Lot 5, Block 3. Date of Sale: 4-9-47.

Maximum Sales Price	$8,000.00
Actual Sales Price	$9,162.60
Direct Overcharge	None
Special Improvement Lien and Interest	$1,162.60
Total Overcharges	$1,162.60

CONSTRUCTION DEFECTS AND OMISSIONS:

	Value
FOUNDATIONS	
House foundations to be 44" in depth from top of footing	$273.80
Garage foundations to be total of 24" in depth	137.00
FRAMING	
All roof rafters to be spaced 16" center to center	102.80
Collar beams (ties, 1"x8") to be spaced 16" between roof rafters	8.00
Garage studs to be 2"x4" lumber	1.80
STORM DOORS AND SCREENS	
Storm windows to be installed, all windows	268.30
PLUMBING AND HEATING	
Laundry trays to be installed	50.00
Two outside sillcocks to be installed	17.50
Kitchen stove fumes to be properly vented	10.00
4" soil pipe vent to be used for bathroom fixtures	100.00
Metal furnace chimney to have double wall construction	10.60
ELECTRIC WIRING AND FIXTURES	
4 non-fuseable load breakers required for lights, outlets and furnace	9.70
Garage light and switch to be installed	10.00
3-way switch to be installed in living room	10.00
Wall switch to be installed in bathroom	6.00
Rear doorbell to be installed	5.00
INSULATION	
2" Rockwool bats to be placed in ceiling	26.50
SHUTTERS AND PORCH RAILINGS	
Shutters to be installed at front windows	20.00
GRADING, WALKS, DRIVEWAY	
Sidewalks to be 3'0" wide	3.75
Top soil for finish grading to be furnished	132.00
Total	$1,202.75

[Endorsed]: Filed December 16, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendants respectfully move the court to dismiss the action and the amended complaint of the plaintiff herein, because

1. The amended complaint in the (a) first count thereof and (b) second count thereof fails to state a claim against the defendants, or any of them, upon which relief can be granted.

2. The amended complaint in the (a) first count thereof and (b) second count thereof fails to show that the plaintiff is entitled to an injunction against the defendants, or any of them, whether mandatory or prohibitory, or to any relief, whatsoever, of an equitable nature.

3. The amended complaint in the (a) first count thereof, and (b) second count thereof, is without equity.

4. The amended complaint in the (a) first count thereof and (b) second count thereof, shows on its face any rights of the plaintiff as asserted in the (a) first count aforesaid, or (b) second count thereof, are stale and therefore at this time unenforceable.

5. The amended complaint in the (a) first count thereof and (b) second count thereof shows on its face the plaintiff is not in any case the real party in interest, but that to the contrary the persons named as purchasers in Exhibit A to the amended complaint annexed are one, each and all the real parties in interest in any action brought and here

maintained under the allegations (a) of the first count of the said amended complaint and (b) of the second count of the said amended complaint.

6. The amended complaint in the (a) first count thereof and (b) second count thereof shows on its face the plaintiff is not in any case authorized by any statute or by law to bring an action, as is the (a) first count of the amended complaint herein and (b) second count of the said amended complaint, in its name for the use or benefit of the persons named as the purchasers in Exhibit A to the said amended complaint annexed, or other wise to sue for them or on their belief, or to enforce rights, if any, otherwise personal and peculiar to them, the purchasers as aforesaid.

7. The amended complaint in the (a) first count and (b) second count thereof shows on its face that the proper party or parties plaintiff in any case is (a) the Housing Expediter of the United States, and (b) the persons named as the purchasers in Exhibit A to the said amended complaint annexed, and none other.

8. The amended complaint in the (a) first count and (b) second count thereof shows on its face the action in each such count here is brought to recover the amount by which the consideration paid for the dwellings or housing units in Exhibit A to the amended complaint annexed exceeded the maximum selling prices thereof, to-wit, exceeded for each such dwelling or unit the maximum price of $8,000.00; but any such action or right of action in the prem-

ises is (a) barred by limitations, or (b) has lapsed for failure to sue within time, to-wit, within one year from the date of the occurrance of the violation or violations alleged.

9. The amended complaint in the (a) first count and (b) second count thereof shows on its face that there is a failure to join either as plaintiffs or defendants herein parties indispensable to an adjudication of the controversy or controversies to which the said amended complaint in the (a) first count and (b) second count thereof refers, viz., a failure so to join the persons named as the purchasers in Exhibit A to the said amended complaint annexed, whose rights and titles are immediately and directly in issue and tendered herein for adjudication.

10. The suit here is in violation of the defendants' right of trial by jury as secured and preserved to them, and each of them, by the Seventh Amendment to the Constitution of the United States, forasmuch as the value in controversy as appears on the face of the amended complaint in the (a) first count and (b) second count thereof exceeds Twenty Dollars and the cause or causes of action upon which the said amended complaint and each the (a) first count and (b) second count thereof is brought are at law and cognizable accordingly in an action or suit at common law.

11. The ammended complaint in the (a) first count and (b) second count thereof shows on its face the plaintiff has a plain, speedy and adequate

filed with the Federal Housing Administration.

This suit seeks a final injunction and is to enforce compliance on the part of the defendants with the requirements of the Regulation and Statute to sell the dwellings at not more than the designated price, and to conform with construction requirements, and, it is stated that as an incident thereto, to compel the defendants to repay that which they illegally acquired.

As grounds for dismissal it is contended that this is an action for breach of contract between the purchasers and defendants and for damages for failure to perform, or that it is for breach of contract for the benefit of third parties. Counsel for plaintiff assert that the Veterans Emergency Housing Program was one established by Congress in the National interest, that priorities might be obtained, and that defendants understood and agreed that in obtaining such priorities they could sell a dwelling at a fixed price, to include the land upon which it was situated and all improvements.

It is alleged that the defendants initiated the action that resulted in the special improvement levy made by the County, and that the defendants represented that the maximum sales price established by law would include all special improvements, and that Regulation 33 so required; it is also provided therein that the builder may make application for an increase in the maximum sales price theretofore established, and the builder here obtained an increase in the maximum sales price on two occasions,

but it is contended this did not relieve the builder from performing his contract according to the plans and specifications, or permit imposing a lien for special improvements upon the property sold.

Under the statutes and authorities cited it would appear that this court has equitable jurisdiction to entertain and decide the facts arising in an action of this kind, and is authorized to order restitution for overcharges and may grant specific performance where the builder has failed to comply with the plans and specifications and where the evidence discloses such construction deficiencies.

It would appear that the United States instituted this action in the public interest as the real party in interest, and that it was not brought on behalf of third parties, and that the obligations assumed by the defendants under their priorities application has been considered as a contractual obligation to the Government. (Creedon v. Randolph, 165 F. (2) 918; U. S. v. Duke Building Corporation, 79 F. Supp. 681).

Plaintiff contends that the one-year statute of limitations in Section 7(d) of the Veterans Emergency Housing Act of 1946 does not apply to a suit by the Government for restitution under Section 7(a), and the authorities cited seem to sustain this contention. (U. S. v. Beebe, 127 U. S. 338, 344; Woods v. McCord, 175 F. (2) 919, 921.)

Other questions raised by learned counsel have been considered and likewise many of the authorities relied upon, and the court now being duly advised,

and good cause appearing therefor, is of the opinion the motion to dismiss should be denied, and such is the order of the court herein, with 20 days to answer upon receipt of notice hereof. (Porter v. Warner Holding Co., 328 U.S. 395.)

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed October 4, 1950.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS A. W. HARTWIG AND JEFF TINGLE

The defendants, A. W. Hartwig and Jeff Tingle, answer the amended complaint as follows:

First Defense

I.

They allege that the amended complaint in the (a) first count thereof and (b) second count thereof fails to state a claim against these defendants, or either of them, upon which relief can be granted.

Second Defense

I.

They deny paragraph 1 of Counts I and II.

II.

They admit that the defendants, A. W. Hartwig, Jeff Tingle and W. C. Jennings, are residents of the city of Billings, county of Yellowstone, state and district of Montana, and that the transactions

referred to in Counts I and II occurred within the Billings Division of this court. Otherwise they deny paragraph 2 of Counts I and II.

III.

They admit that the Civilian Production Administration issued Priority Regulation 33 (11 F.R. 601, 4085), that the Housing Expediter issued Housing Expediter Priorities Order 1 (11 F.R. 9507), that the Civilian Production Administration on or about August 27, 1946, issued what it styled an Amendment of Schedule A to Priorities Regulation 33, that Executive Order 9836 in terms transferred to the Housing Expediter certain functions and authority of the Civilian Production Administration, and that Housing Expediter Priorities Order 5 (12 F.R. 2111) and Executive Order 9836 (12 F.R. 1939) were issued. Otherwise they deny paragraph 3 of Counts I and II.

IV.

They deny paragraph 4 of Counts I and II.

V.

They admit that Section 944.54(e) of said Priorities Regulation 33 provided as follows, viz.,

"(e) Construction of the project. A builder who uses the HH rating to get materials for housing accommodations must construct them in accordance with the description given in the application, except where he has obtained from the Federal Housing Administration approval for a change from the application."

Otherwise they deny paragraph 5 of Count I.

VI.

They admit that they applied for and received authorization for priorities assistance to construct twenty-seven buildings in the Calhoun Lane Subdivision near Billings in Yellowstone County, Montana; that such authorization was obtained from the Federal Housing Administration, an agency of the United States, to wit., on or about July 1, 1946, under Priorities Application No. 6-093-269, Federal Housing Administration Serial Nos. 31-006,158 to 31-006,184, both inclusive, for the construction of twenty-seven dwelling units in the subdivision aforesaid, identified as Type 1 and Type 1-a houses; that on or about November 4, 1946, the Federal Housing Administration on the application of these defendants established a maximum sale price of $8,000.00 for each such dwelling unit, the first such price so established theretofore of $6,000.00 having been first so increased to $6,465.00 per unit; that the increases so established in the maximum sale price of each dwelling unit aforesaid were made at the request of these defendants and upon the basis of certain written specifications of date June 4, 1946, and a certain written description of the requisite materials, dated June 15, 1946, both submitted by these defendants to the Federal Housing Administration, and further of the certain plans tendered therewith covering the construction of the types of dwelling units aforesaid, viz., Type 1 and Type 1-a, which were then and there under construction, and also upon the basis of certain written estimates and breakdcwns of construction costs entering into the

units so under construction or to be constructed, and that the final maximum sales price of $8,000.00 for each dwelling unit aforesaid was duly approved.

They deny any express or other representation made by them, or either of them, to the Federal Housing Administration that the maximum sale price of $8,000.00 aforesaid, or any other maximum price so established, included all or any special improvements whether watermains, sanitary sewers, concrete curbs, gutters, street paving, or otherwise, and deny accordingly any representation at all by them, or either of them, made, in anywise in connection therewith, or with any special improvements at all.

And otherwise they deny paragraph 6 of Counts I and II.

VII.

They admit that they used Priorities Application No. 6-093-269 to obtain some building materials actually used in the construction of the dwellings more particularly described in Exhibit A, pages 1 to 24, to the plaintiff's amended complaint annexed.

VIII.

They admit that after the issuance by the Federal Housing Administration of authorization as aforesaid for priorities assistance these defendants completed the construction of, and sold, twenty-five buildings under the said priority and of the dwelling units identified by the Federal Housing Administration serial numbers aforesaid. Otherwise they deny any failure to construct the said dwellings,

or any of them, in accordance with the plans or specifications, or any thereof, contained in the application approved by the Federal Housing Administration, whether as set out in Exhibit A to the amended complaint herein attached, or as made to appear elsewhere, and so deny paragraph 8 of Count I.

IX.

They deny paragraph 9 of Count I.

X.

They admit that Section 944.54(g) of Priorities Regulation 33 so far as applicable to the units here, or any of them, all of which are one-family dwellings, provided:

> "(ii) A builder must not sell a one-family dwelling built or converted under the Reconversion Housing Program, including the land and all improvements (including garage if provided), for more than the maximum sales price specified in the application, including within this sales price the amount of any brokerage fees or commissions paid in connection with the sale, whether paid by the builder or by the purchaser."

Otherwise they deny paragraph 11 of Count II.

XI.

They admit that after the issuance by the Federal Housing Administration of authorization as aforesaid for priorities assistance these defendants completed the construction of, and sold, twenty-five buildings under the said priority and of the dwell-

ing units identified by the Federal Housing Administration serial numbers aforesaid. Otherwise they deny the sale of nine of the said dwellings, or any thereof, at any price in excess of the maximum sales price of $8,000.00 approved by the Federal Housing Administration, and whether as set out in Exhibit A attached to the amended complaint, or otherwise, and so deny paragraph 12 of Count II.

XII.

They admit that these defendants petitioned the Board of County Commissioners of Yellowstone County, Montana, to create a special improvement district for the construction of watermains, sewers, concrete curbs, gutters and oil mix pavements; that on or about November 8, 1946, said special improvement district, designated as Rural Special Improvement District No. 73, was approved, and thereafter constructed pursuant to a contract entered into by the Board of County Commissioners of Yellowstone County with A. W. Hartwig Construction Company; that thereafter and on or about July 28, 1947, the Board of County Commissioners of Yellowstone County, Montana, adopted its resolution making the payment for the special improvements so constructed in said Special Improvement District No. 73 a lien against all the property in the said district; that on or about July 28, 1947, the A. W. Hartwig Construction Company was paid for the construction of certain special improvements within the district aforesaid by the issuance of bonds against the said district; and that thereafter the real property within the said Special Improve-

ment District No. 73 was regularly assessed for the improvements therein so constructed, and accordingly was subjected to a lien therefor. Otherwise they deny paragraph 13 of Count II.

XIII.

They deny paragraph 14 of Count II.

XIV.

They deny generally every allegation in the said amended complaint contained, which has not been otherwise hereinbefore admitted or denied.

Third Defense

I.

They allege that the amended complaint in the (a) first count thereof, and (b) second count thereof is without equity.

Fourth Defense

I.

They allege that any rights asserted by the plaintiff (a) in the first count or (b) in the second count of the amended complaint are stale, and therefore at this time unenforceable.

Fifth Defense

I.

They allege that the plaintiff is not the real party in interest (a) under the first count or (b) under the second count of the amended complaint herein, but that to the contrary the persons named as purchasers in Exhibit A to the amended complaint annexed are the real parties in interest in any action brought and here maintained upon the claim asserted (a) in the said first count and (b) in the

said second count. Accordingly the action here may only be brought and maintained, if at all, upon the claims (a) in the first count aforesaid asserted and (b) in the second count aforesaid asserted, viz., under Section 7(d) of the Veterans' Emergency Housing Act of 1946 by the purchasers of the housing accommodations herein, who are the persons named in Exhibit A aforesaid, or under Section 7(a) of the said Act by the Housing Expediter of the United States as a party authorized thereunto by statute.

Sixth Defense

I.

They allege that any action or right of action herein and any claim asserted (a) in the first count and (b) in the second count of the amended complaint is (1) barred by limitations, or (2) has lapsed for failure to sue within time, to-wit, because the persons named in Exhibit A to the amended complaint annexed, who bought the housing accommodations or dwelling units in the said counts mentioned, did not bring an action within one year from the date of the occurrence of the alleged violation or violations specified in the said counts, and in each thereof, viz., for the amount each by which the consideration paid exceeded the said maximum selling price of $8,000.00.

Seventh Defense

I.

They allege that parties indispensable to an adjudication of the controversy or controversies to which the claims asserted (a) in the first count and

(b) in the second count of the amended complaint refer are not joined in this action either as plaintiffs or defendants, viz., the persons who are named in Exhibit A to the amended complaint annexed, and who are the purchasers of the housing accommodations or dwelling units mentioned in the said counts, are not joined in this suit either as parties plaintiff or defendant, and are no one of them in anywise impleaded herein.

Eighth Defense

I.

They allege that pecuniary damages recovered upon a trial to a jury as at common law and in a common law action for damages is a plain, speedy and adequate remedy at law in the premises and for the vindication of the claim asserted (a) in the first count and (b) in the second count herein; and that accordingly the plaintiff is not entitled to, and may not in this suit have, an injunction whether mandatory or prohibitory, or other relief in equity, whatsoever.

Ninth Defense

I.

They allege that these defendants in good faith constructed and completed the housing accommodations or dwelling units, to which (a) the first count and (b) the second count herein refer, viz., in substantial compliance with the written specifications, description of materials and plans approved by the plaintiff, acting through the Federal Housing Administration; and that thereafter the said plaintiff, likewise acting through the Federal Housing Ad-

ministration, inspected and thereupon accepted the said dwellings so constructed and completed, to-wit, as in full conformity with such specifications, descriptions and plans, and as full performance by and on the part of these defendants of their or any contract in the premises with the plaintiff, or otherwise, for the construction and completion of the said housing accommodations, and as full satisfaction and in full discharge of all and every the obligation of the defendants, or either of them, under any such contract.

Tenth Defense

I.

They allege that one and all the housing accommodations or dwelling units, to which (a) the first count and (b) the second count herein refer, were long heretofore and before the commencement of this suit, to-wit, on or before June 17, 1947, completed and sold, and the titles thereto passed to the purchasers, respectively; that the alterations in any such dwelling as are the specifications of the amended complaint herein, and particularly of Exhibit A thereto annexed, require fundamental changes in the integral construction of the said dwellings, viz., changes, which cannot be made without wrecking and rebuilding each unit aforesaid, specifically upon a new foundation and with a new framework, etc.; that moreover these defendants do not have, and neither of them has, adequate resources material and financial, or either, to make and complete such alterations and changes and thus in effect to rebuild anew the said units and to pay

off and satisfy the lien and the bonds for the indebtedness secured thereby of Rural Special Improvement District No. 73, all of which likewise long heretofore and before the commencement of this action and during the year 1947 were sold and transferred to third persons for value and without notice of the plaintiff's claims in the premises, or of any infirmity or defect therein, or in any thereof; and that accordingly, the mandatory injunction or other order of this Court in the premises to coerce these defendants specifically to perform as the plaintiff prays herein will be of necessity ineffectual and nugatory, because compliance therewith by these defendants, or either of them, will be impossible, and wholly beyond their ability to render.

Wherefore these defendants pray that the amended complaint and suit of the plaintiff here be dismissed, that they, and each of them, have judgment on the merits, and that they have further all other relief in this suit which may be agreeable to equity.

/s/ HORACE S. DAVIS,
Attorney for Defendants.
ROCKWOOD BROWN &
HORACE S. DAVIS,
NORMAN HANSON,
WILLIAM H. BELLINGHAM,
/s/ By HORACE S. DAVIS,
Attorneys for Defendants.

Acknowledgment of Service attached.

[Endorsed]: Filed October 31, 1950.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT W. C. JENNINGS

The defendant, W. C. Jennings, answers the amended complaint as follows:

First Defense

I.

He alleges that the amended complaint in the (a) first count thereof and (b) second count thereof fails to state a claim against this defendant upon which relief can be granted.

Second Defense

I.

He denies paragraph 1 of Counts I and II.

II.

He admits that the defendants, A. W. Hartwig, Jeff Tingle and W. C. Jennings, are residents of the city of Billings, county of Yellowstone, state and district of Montana, and that the transactions referred to in Counts I and II occurred within the Billings Division of this court. Otherwise he denies paragraph 2 of Counts I and II.

III.

He admits that the Civilian Production Administration issued Priority Regulation 33 (11 F.R. 601, 4085), that the Housing Expediter issued Housing Expediter Priorities Order 1 (11 F.R. 9507), that the Civilian Production Administration on or about August 27, 1946, issued what it styled an Amendment of Schedule A to Priorities Regulation 33, that

Executive Order 9836 in terms transferred to the Housing Expediter certain functions and authority of the Civilian Production Administration, and that Housing Expediter Priorities Order 5 (12 F.R. 2111) and Executive Order 9836 (12 F.R. 1939) were issued. Otherwise he denies paragraph 3 of Counts I and II.

IV.

He denies paragraph 4 of Counts I and II.

V.

He admits that Section 944.54(a) of said Priorities Regulation 33 provided as follows, viz.,

> "(e) Construction of the project. A builder who uses the HH rating to get materials for housing accommodations must construct them in accordance with the description given in the application, except where he has obtained from the Federal Housing Administration approval for a change from the application."

Otherwise he denies paragraph 5 of Count I.

VI.

He denies paragraphs 6 and 7 of Counts I and II and 8 and 9 of Count I.

VII.

He admits that Section 944.54(g) of Priorities Regulation 33 so far as applicable to the units here, or any of them, all of which are one-family dwellings, provided:

"(ii) A builder must not sell a one-family dwelling built or converted under the Reconversion Housing Program, including the land and all improvements (including garage if provided), for more than the maximum sales price specified in the application, including within this sales price the amount of any brokerage fees or commissions paid in connection with the sale, whether paid by the builder or by the purchaser."

Otherwise he denies paragraph 11 of Count II.

VIII.

He denies paragraph 12 of Count II.

IX.

He admits that on or about November 8, 1946, a special improvement district, designated as Rural Special Improvement District No. 73, for water mains, sewers, concrete curbs, gutters and oil mix pavement was approved, and thereafter constructed pursuant to a contract entered into by the Board of County Commissioners of Yellowstone County with A. W. Hartwig Construction Company; that thereafter and on or about July 28, 1947, the Board of County Commissioners of Yellowstone County, Montana, adopted its resolution making the payment for the special improvements so constructed a lien against all the property in the said district; that on or about July 28, 1947, the A. W. Hartwig Construction Company was paid for the construction of certain special improvements within the dis-

trict aforesaid by the issuance of bonds against the said district; and that thereafter the real property within the said Special Improvement District No. 73 was regularly assessed for the improvements therein so constructed, and accordingly was subjected to alien therefor. Otherwise he denies paragraph 13 of Count II.

X.

He denies paragraph 14 of Count II.

XI.

He denies generally every allegation in the said amended complaint contained, which has not been otherwise hereinbefore admitted or denied.

Third Defense

I.

He alleges that the amended complaint in the (a) first count thereof, and (b) second count thereof is without equity.

Fourth Defense

I.

He alleges that any rights asserted by the plaintiff (a) in the first count or (b) in the second count of the amended complaint are stale, and therefore at this time unenforceable.

Fifth Defense

I.

He alleges that the plaintiff is not the real party in interest (a) under the first count or (b) under the second count of the amended complaint herein,

but that to the contrary the persons named as purchasers in Exhibit A to the amended complaint annexed are the real parties in interest in any action brought and here maintained upon the claim asserted (a) in the said first count and (b) in the said second count. Accordingly the action here may only be brought and maintained, if at all, upon the claims (a) in the first count aforesaid asserted and (b) in the second count aforesaid asserted, viz., under Section 7(d) of the Veterans' Emergency Housing Act of 1946 by the purchasers of the housing accommodations herein, who are the persons named in Exhibit A aforesaid, or under Section 7(a) of the said Act by the Housing Expediter of the United States as a party authorized thereunto by statute.

Sixth Defense

He alleges that any action or right of action herein and any claim asserted (a) in the first count and (b) in the second count of the amended complaint is (1) barred by limitations, or (2) has lapsed for failure to sue within time, to-wit, because the persons named in Exhibit A to the amended complaint annexed, who bought the housing accommodations or dwelling units in the said counts mentioned, did not bring an action within one year from the date of the occurrence of the alleged violation or violations specified in the said counts, and in each thereof, viz., for the amount each by which the consideration paid exceeded the said maximum selling price of $8,000.00.

Seventh Defense

I.

He alleges that parties indispensable to an adjudication of the controversy or controversies to which the claims asserted (a) in the first count and (b) in the second count of the amended complaint refer are not joined in this action either as plaintiffs or defendants, viz., the persons who are named in Exhibit A to the amended complaint annexed, and who are the purchasers of the housing accommodations or dwelling units mentioned in the said counts, are not joined in this suit either as parties plaintiff or defendant, and are no one of them in anywise impleaded herein.

Eighth Defense

I.

He alleges that pecuniary damages recovered upon a trial to a jury as at common law and in a common law action for damages is a plain, speedy and adequate remedy at law in the premises and for the vindication of the claim asserted (a) in the first count and (b) in the second count herein; and that accordingly the plaintiff is not entitled to, and may not in this suit have, an injunction whether mandatory or prohibitory, or other relief in equity, whatsoever.

Ninth Defense

I.

He alleges that one and all the housing accommodations or dwelling units, to which (a) the first count and (b) the second count herein refer, were

long heretofore and before the commencement of this suit, to-wit, on or before June 17, 1947, completed and sold, and the titles thereto passed to the purchasers, respectively; that the alterations in any such dwelling as are the specifications of the amended complaint herein, and particularly of Exhibit A thereto annexed, require fundamental changes in the integral construction of the said dwellings, viz., changes, which cannot be made without wrecking and rebuilding each unit aforesaid, specifically upon a new foundation and with a new framework, etc.; that moreover this defendant does not have adequate resources material and financial, or either, to make and complete such alterations and changes and thus in effect to rebuild anew the said units and to pay off and satisfy the lien and the bonds for the indebtedness secured thereby of Rural Special Improvement District No. 73, all of which likewise long heretofore and before the commencement of this action and during the year 1947 were sold and transferred to third persons for value and without notice of the plaintiff's claims in the premises, or of any infirmity or defect therein, or in any thereof; and that accordingly, the mandatory injunction or other order of this Court in the premises to coerce this defendant specifically to perform as the plaintiff prays herein will be of necessity ineffectual and nugatory, because compliance therewith by this defendant will be impossible, and wholly beyond his ability to render.

Wherefore this defendant prays that the amended complaint and suit of the plaintiff be

here dismissed, that he have judgment on the merits and that he have further all other relief in this suit which may be agreeable to equity.

/s/ HORACE S. DAVIS,
Attorney for Defendant.

ROCKWOOD BROWN &
HORACE S. DAVIS,
NORMAN HANSON,
WILLIAM H. BELLINGHAM,
/s/ By HORACE S. DAVIS,
Attorney for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed October 31, 1950.

[Title of District Court and Cause.]

MOTION TO STRIKE AND MOTION FOR SUMMARY JUDGMENT

The defendants herein having filed their answers, the defendant W. C. Jennings having filed a separate answer to the answer filed by the defendants A. W. Hartwig and Jeff Tingle, and the defendants having filed a demand for jury trial, plaintiff moves the Court for an order striking the demand for jury trial and portions of the respective answers hereinafter specified in accordance with Rule 12 of the Rules of Civil Procedure, and for a summary judgment in favor of the plaintiff upon a part of the plaintiff's claim set forth in the Amended Complaint herein, in accordance with Rule 56 of the Rules of Civil Procedure.

MOTION TO STRIKE

Plaintiff moves to strike the following:

1. The demand for jury trial filed by the defendants herein, for the reason and on the ground that the decision of the Court on the Defendants' Motion to Dismiss duly given, made, and filed on the 4th day of October, 1950, decides and determines that this Court has equitable jurisdiction in this cause and further denies the plaintiff's Motion to Dismiss wherein it was contended under Paragraph 10 of said Motion that the defendants had a right of trial by jury.

2. The first defense set forth in the answer of the defendant W. C. Jennings and the answer of the defendants A. W. Hartwig and Jeff Tingle on the ground and for the reason that said first defense is an insufficient defense and is redundant and immaterial and that this Court has heretofore, by its order duly given, made, and entered on the 4th day of October, 1950, decided and determined that the Amended Complaint herein does state a claim against these defendants upon which relief can be granted.

3. The third defense set forth and contained in the respective answers of the defendants herein, on the ground and for the reason that said third defense, in each of said answers, is an insufficient defense and is redundant and immaterial since this Court has, by its order duly given, made and entered on the 4th day of October, 1950, decided and determined that the Amended Complaint on file

herein is sufficient to invoke the equitable jurisdiction of this Court.

4. The fourth defense set forth and contained in the respective answers on file herein on the ground and for the reason that the matters therein alleged constitute an insufficient defense and are redundant and immaterial, as this Court has, by its order duly given, made and entered on the 4th day of October, 1950, decided and determined that the rights asserted by the plaintiff in the Amended Complaint on file herein are enforceable.

5. The fifth defense set forth and contained in the respective answers on file herein, on the ground and for the reason that they are an insufficient defense and are redundant and immaterial as this Court has heretofore, by its order duly given, made and entered on the 4th day of October, 1950, decided and determined that the plaintiff is the real party in interest herein, and that the action may be brought and maintained by the plaintiff in the public interest.

6. The sixth defense set forth and contained in the respective answers on file herein, on the ground and for the reason that they are an insufficient defense and are redundant and immaterial, as this Court as heretofore, by its order duly given, made and entered on the 4th day of October, 1950, determined that the claim asserted in the Amended Complaint on file herein is not barred by limitations nor has said claim lapsed for failure to sue within one year.

7. The seventh defense set forth and contained

in the respective answers on file herein, on the ground and for the reason that they are an insufficient defense and are redundant and immaterial and this Court has, by its order duly given, made and entered on the 4th day of October, 1950, decided and determined that the plaintiffs named in "Exhibit A" attached to and made a part of the Amended Complaint, need not be made plaintiffs or defendants, and that the action set forth in the Amended Complaint on file herein may be instituted and maintained by the plaintiff, United States of America, in the public interest as the real party in interest.

8. The eighth defense set forth and contained in the respective answers on file herein, on the ground and for the reason that they are an insufficient defense and are redundant and immaterial in that this Court has, by its order duly given, made and entered on the 4th day of October, 1950, decided and determined that this Court has equitable jurisdiction to entertain and decide the facts arising in an action of this kind and is authorized to order restitution for overcharges and may grant specific performance.

9. The ninth defense set forth and contained in the answer of W. C. Jennings and the tenth defense set forth and contained in the answer of the defendants A. W. Hartwig and Jeff Tingle, on the ground and for the reason that they are an insufficient defense and are redundant and immaterial in that if, as alleged, it will be necessary to make fundamental changes in the integral construction of

said dwellings, the Court has jurisdiction to grant money damages in lieu of such changes, and the inability of the defendants, or any of them, to satisfy a judgment that might be awarded to the plaintiff herein is not a sufficient basis in law for denying to the plaintiff the relief prayed for.

10. That portion of the ninth defense set forth and contained in the answer of the defendants A. W. Hartwig and Jeff Tingle reading as follows: "and that thereafter the said plaintiff, likewise acting through the Federal Housing Administration, inspected and thereupon accepted the said dwellings so constructed and completed, to-wit, as in full conformity with such specifications, descriptions and plans, and as full performance by and on the part of these defendants of their or any contract in the premises with the plaintiff, or otherwise, for the construction and completion of the said housing accommodations, and as full satisfaction and in full discharge of all and every the obligation of the defendants, or either of them, under any such contract." on the ground and for the reason that said allegation is an insufficient defense and is redundant and immaterial in that Priority Regulation 33 provides that written approval for a change in plans and specifications submitted with the application for priorities assistance must be obtained. Section 944.54(e) of said Priorities Regulations, as amended June 14, 1946, (11 F.R. 6598) and correctly quoted at Page 7 of plaintiff's brief on defendants' motion to dismiss, provides as follows:

"(e) Construction of the project. A builder who constructs, converts, alters or repairs housing accommodations under this regulation must do the work in accordance with the description given in the application, except where he has obtained written approval for a change from the agency which approved the original application."

MOTION FOR SUMMARY JUDGMENT

Plaintiff moves the Court for a summary judgment in favor of the plaintiff upon a part of the plaintiff's claim set forth in the Amended Complaint as follows:

That a mandatory injunction and order be issued directing the defendants to make restitution to each of the purchasers named in "Exhibit A" attached to and made a part of the Amended Complaint by paying and satisfying the special improvement levy or tax for watermains, sewers, concrete curbs, gutters and oil mix pavement, which said levy or tax was made by the County of Yellowstone, Montana, as against each of the dwellings referred to in the Amended Complaint and designated in both the Amended Complaint and the answers on file herein as Rural Special Improvement District Number 73 for water mains, sewers, concrete curbs, gutters and oil mix pavement, or, in the event that any of said purchasers named in "Exhibit A" attached to and made a part of the Amended Complaint have paid and satisfied the special improvement levy or tax as against a particular dwelling, then that the order

direct that the payment of such tax lien be made to any such purchaser.

This motion for summary judgment is made and based upon the fact that the pleadings on file herein, together with the law applicable and the decision of this Court duly given, made and entered on the 4th day of October, 1950, show that there is no genuine issue as to any material fact concerning the said special improvement levy or tax and that the plaintiff is entitled to a judgment on that issue as a matter of law.

The Amended Complaint on file herein, and particularly in Count II of the Amended Complaint, alleges in Paragraphs 13 and 14 certain facts concerning the special improvement levy and refers to Rural Special Improvement District Number 73 of Yellowstone County, Montana.

The answers on file herein in the second defense admit the fact that the County of Yellowstone established and approved Rural Special Improvement District Number 73 and admit that the real property within the said Rural Special Improvement District Number 73 was regularly assessed for the improvements and that said property lying within said Rural Special Improvement District Number 73 has been subjected to a lien for the said special improvements.

It further appears that both the answers of the defendant W. C. Jennings, and the answer of A. W. Hartwig and Jeff Tingle admit and quote the pro-

visions of Section 944.54(g) (ii) of Priorities Regulation 33, as follows, to-wit:

> "(ii) A builder must not sell a one family dwelling built * * * under the Reconversion Housing Program including the land and all improvements (including garage if provided) for more than a maximum sales price specified in the application * * *."

It, therefore, appears that plaintiff is entitled to a summary judgment directing the defendants to satisfy the levy or tax made against the dwellings referred to in the Amended Complaint on file herein by paying and satisfying the assessment made by Yellowstone County pursuant to Rural Special Improvement District Number 73, or if any of the persons named in "Exhibit A" attached to the Amended Complaint have paid the special improvement levy as it affects the particular dwelling purchased, then by restoring to said purchaser the amount expended by him in satisfying the said special improvement levy or tax.

It is respectfully requested that this motion be heard and determined before the trial of the case herein on its merits.

Dated this 28th day of December, 1950.

/s/ EMMETT C. ANGLAND,
Acting United States Attorney.

[Endorsed]: Filed December 28, 1950.

[Title of District Court and Cause.]

AFFIDAVIT OF A. W. HARTWIG, DEFENDANT

United States of America,
State and District of Montana,
County of Yellowstone—ss.

A. W. Hartwig, of lawful age, being first duly sworn, upon his oath deposes and says:

I am one of the defendants in this action. I reside at Billings, Montana. By occupation I am a contractor.

With Jeff Tingle, one of the codefendants in this action, I built or constructed twenty-seven buildings in the Calhoun Lane Subdivision near Billings in Yellowstone County, Montana, twenty-four of which are the dwelling units mentioned in the amended complaint in this suit.

We used Priorities Application No. 6-093-269 to obtain building materials used in the construction of these dwellings.

During this construction work these dwelling units were repeatedly inspected by officials of the Federal Housing Administration, an agency of the United States of America, the plaintiff in this action, who came from the office of the State Director at Helena, Montana, viz., in the regular course of their duties and for the specific purpose of determining whether the construction of these dwelling units by us complied with the Veterans' Emergency Housing Program and the orders and regulations

of the Housing Expediter and with law, and conformed particularly to the plans and specifications and description of materials contained in the application made to the Federal Housing Administration for priorities, and by it approved.

The plans, specifications, sometimes called the Narrative Specifications, and the description of materials as approved by the Federal Housing Administration for the construction of these dwellings, were received for this affiant and his partner, the defendant, Jeff Tingle, about July 5 or 6, 1946, by one H. L. White, the cashier of Security Trust & Savings Bank, of Billings, Montana, which was interested in securing Federal Housing Administration insured loans upon these dwellings as they were constructed and sold.

In other words, under date of July 3, 1946, the Federal Housing Administration of the United States through the office of its State Director at Helena, Montana, and by Mr. S. L. Berg, its chief underwriter, addressed and mailed the following letter to Mr. White, viz.,

"July 3, 1946

"Mr. H. L. White, Cashier
Security Trust & Savings Bank
Billings, Montana.

Re: Hartwig, Tingle Homes, Billings

Dear Mr. White:

We enclose herewith one set each of the No. 1 and No. 1-a house plans together with one copy of the Narrative Specifications and one copy of our Form No. 2005, Description of Materials.

Please deliver these documents to Mr. Hartwig to be used on the job during the construction of these houses.

Very truly yours,

S. L. BERG,

S. L. Berg,

Chief Underwriter."

SLB:ek—encls.

Sometime about July 5 or 6, 1946, Mr. White gave me the one set each of the No. 1 and No. 1-a House Plans and also the copy of the Narrative Specifications, and the further copy of Form No. 2005, the Description of Materials, all of which are mentioned in the letter set out above. The construction of the units in the Calhoun Lane Subdivision, and particularly of the twenty-four dwellings to which the amended complaint in this suit refers, was carried on and finished in accordance with these plans, specifications and description of materials, as detailed in this affidavit.

As each of these twenty-four units was completed there was a final inspection by an official or officer of the Federal Housing Administration of the United States out of the office of its State Director at Helena, Montana, who in the discharge of his duties and in the regular course of his office as authorized by the United States checked each dwelling unit against the approved plans, specifications and description of materials. Other like inspections were made from time to time theretofore during the progress of the work. At the conclusion of the final

inspection in the case of each of these twenty-four units to which the amended complaint refers there was the final inspection mentioned and an approval of the construction of the unit then given in writing by the Federal Housing Administration of the United States, viz., in each case in substance and to the effect that construction had been completed in compliance with the approved drawings, description of materials, specific conditions of the commitment and applicable requirements.

In the case of each of the units mentioned in the amended complaint the inspector in writing made a detailed report over his signature upon "FHA Form No. 2051". "Exhibit A" hereto annexed is a typical photostatic copy of the report so made in the case of Leonard O. Apps and wife, the purchasers of the dwelling on Lot 8 of Block 2 of the Calhoun Lane Subdivision at 125 Bruce Avenue. (Am. Comp., Ex. A, p. 2.) Because the case of Mr. and Mrs. Apps is substantially identical with each one of the other twenty-three cases presented in the amended complaint, I have set out as "Exhibit A" to this affidavit this photostat of the Compliance Inspection Report and of the written approval of the construction of this unit actually given by the Federal Housing Administration of the United States as typical also of the like Compliance Inspection Report and written approval given by the Federal Housing Administration for each of the other twenty-three units mentioned as well. In all these cases the form of this report and approval by the administration is the same. Such minor varia-

tions as there may be in dates, officials executing the reports, and remarks made therein will be noted generally and explained as each case is taken up in this affidavit. Otherwise the form and language of the report and approval given by the Federal Housing Administration to cover the construction of the dwelling unit sold to Mr. and Mrs. Apps stand for the like report and written approval in each of the other twenty-three cases.

Upon the report and approval in the case of Mr. and Mrs. Apps (Am. Comp., E. A, p. 2) it is noted that the final inspection of this unit was made of date October 23, 1947, by H. A. Vikens, the Staff Valuator of the Federal Housing Administration, who was an official in the office of the State Director of the Administration at Helena, Montana, and whose duties were to check compliance in the construction of the unit in question with the approved drawings or plans, specifications and description of materials, etc., and to note and report changes or variations in the work from these drawings, specifications and description of materials.

On this report it is noted that Mr. Vikens reported the "Building improvements acceptable completed."

Over his signature there then appears this certification, viz.,

"I certify that I have carefully inspected this property on this date, and I have reported all substantial variations from the approved drawings and Description of Materials, specific conditions of the commitment and applicable requirements, and that

I have no personal interest, present or prospective in the property, applicant or proceeds of the mortgage.

Inspected (date) 10/23/47 By (Signed) H. A. Vikens.

[ ] Construction Examiner, [x] Valuator, [x] Staff, [ ] Fee, [ ] Per Diem"

Next this report records the approval on October 29, 1947, in writing over the signature of L. O. Bradford, the assistant Chief Architect in the Helena office of the State Director of the Federal Housing Administration, viz., of the construction of this dwelling as thus completed by the contractors, Hartwig and Tingle.

Finally on February 24, 1948, this report further discloses on its face that S. L. Berg, the Chief Underwriter for the Federal Housing Administration in the office of its State Director at Helena, Montana, certified to compliance by the contractors, Hartwig and Tingle, in this fashion, viz.,

"[x] B. COMPLIANCE
Firm commitment.
Closing papers may be submitted."

Translated as this report indicates by reference to the "statement on reverse side corresponding to designation checked.", this endorsement by Mr. Berg means the following, to-wit:

"B. COMPLIANCE. Firm Commitment.
Construction has been completed and all specific conditions of the commitment have been acceptably fulfilled. Closing papers may be submitted."

Like reports were submitted and like written approvals were given in the cases of the other twenty-three units, I repeat, to which the amended complaint refers, i.e., all these other twenty-three dwellings were approved in writing in like fashion by the Federal Housing Administration through the office of its State Director at Helena, Montana, with only minor differences in any one case from any other. But that there may be no uncertainty in this connection reference is now made by me to each of these twenty-three other units individually.

Specifically, the unit sold to E. R. Bahn and wife at 121 Bruce Avenue on Lot 6 in Block 2 of the Calhoun Lane Subdivision (Am. Comp., Ex. A, p. 3) was inspected and found to conform to the "approved drawings and Description of Materials, specific conditions of the commitment and applicable requirements", viz., on the same dates and in the same manner and language and by the same officials of the State Director's office of the Federal Housing Administration at Helena, Montana, as in the case of the unit sold Leonard O. Apps and wife.

Likewise of the unit at 116 Bruce Avenue on Lot 4 in Block 3 of the Calhoun Lane Subdivision, sold to R. R. Bailey and wife. (Am. Comp., Ex. A, p. 4) So also of the unit at 127 Bruce Avenue on Lot 9 in Block 2 of the Calhoun Lane Subdivision, sold to W. A. Crutcher and wife. (Am. Comp., Ex. A, p. 6)

And of the unit at 111 Bruce Avenue, Lot 1 in Block 2 of the Calhoun Lane Subdivision, sold to

Alva A. Harms and wife. (Am. Comp., Ex. A, p. 7) And of the dwelling at 123 Bruce Avenue on Lot 7 in Block 2 of the Calhoun Lane Subdivision, sold to Roy W. Hodge and wife. (Am. Comp., Ex. A, p. 8) And of the dwelling at 116 Arden Avenue on Lot 15 in Block 2 sold to Ivan F. Hutchens and wife. (Am. Comp., Ex. A, p. 9)

Also the dwelling at 110 Arden Avenue on Lot 18 in Block 2 of the Calhoun Lane Subdivision sold to Le Roy D. Jensen and wife (Am. Comp., Ex. A, p. 10), save that the approval here was given on January 27, 1947, by A. T. Swanson, the Staff Valuator, by P. M. Johnson, the Chief Architect, and by S. L. Berg, the Chief Underwriter, all of the office of the State Director of the Federal Housing Administration at Helena, Montana, but otherwise for the administration in the same manner and form as in the case above of Leonard O. Apps and wife.

The dwelling at 122 Arden Avenue on Lot 12 in Block 2 of the Calhoun Lane Subdivision, sold to Charles Kuhne and wife (Am. Comp., Ex. A, p. 11), was inspected and approved again on the same dates by the same officials of the Federal Housing Administration and in the same form as in the case of Leonard O. Apps and wife. Likewise the dwelling at 124 Bruce Avenue on Lot 8 in Block 3 of the Calhoun Lane Subdivision, sold to R. B. McGinnis and wife, was approved in all things in the same form and manner and upon the same dates and by the same officials of the Federal Housing Administration as in the case also of Mr. Apps.

And also the unit at 117 Bruce Avenue on Lot 4 in Block 2 of the Calhoun Lane Subdivision, sold to F. J. Newman and wife, save for the notation that there was no walk to the clothes line, which was however waived. This walk has since been installed.

The dwelling at 126 Arden Avenue on Lot 10 in Block 2 of the Calhoun Lane Subdivision, sold to Leonard W. Noyes and wife (Am. Comp., Ex. A., p. 15), was also in all particulars approved by the Federal Housing Administration at the same time and by the same officials as was the unit sold to Leonard O. Apps and wife, but with the comment also that there was no walk to the clothes line or the back of the lot. This walk too has since been laid.

The unit at 114 Arden Avenue on Lot 16 in Block 2 of the Calhoun Lane Subdivision, which was sold to John H. Nickerson and wife, was approved in all things also by the Federal Housing Administration on the same dates and by the same officials and in like manner and form as in the case of the dwelling at 110 Arden Avenue, sold to LeRoy D. Jensen and wife. (Am. Comp., Ex. A, p. 16)

Approval was had by the Federal Housing Administration of the construction of the dwelling at 114 Bruce Avenue on Lot 3 in Block 3 of the Calhoun Lane Subdivision, sold to N. A. Potter and wife (Am. Comp., Ex. A, p. 17), viz., on the same dates and by the same officials and in the same manner and form again as with the unit sold to Leonard O. Apps and wife. There was here only the exception taken that there was no clothes line

or walk to the back of the lot; but these installations have since been made.

Approval was had of the dwelling at 118 Arden Avenue on Lot 14 in Block 2 of the Calhoun Lane Subdivision, sold to Merle R. Price and wife (Am. Comp., Ex. A, p. 18), viz., on the same dates and in the same manner and form by the Federal Housing Administration acting through the same officials precisely as in the case again of Leonard O. Apps and wife, and without exception taken or further requirement made.

So also for the unit at 110 Bruce Avenue on Lot 1 in Block 3 of the Calhoun Lane Subdivision, sold to Jimmie Scott. (Am. Comp., Ex. A, p. 19) There was approval by the Federal Housing Administration in the same manner and form and on the same dates and through the same officials again as in the Apps case. And also of the dwelling at 120 Arden Avenue on Lot 13 in Block 2 of the Calhoun Lane Subdivision, sold to R. M. Stearns and wife. (Am. Comp., Ex. A, p. 20) And of the dwelling at 119 Bruce Avenue on Lot 5 in Block 2 of the Calhoun Lane Subdivision, sold to Louis P. Studer and wife (Am. Comp., Ex. A, p. 2), with the exception again of the omission of a walk to the clothes line, which has since been put in.

The dwelling at 120 Bruce Avenue on Lot 6 in Block 3, sold to John C. Wade and wife (Am. Comp., Ex. A, p. 22); at 115 Bruce Avenue on Lot 3 in Block 2, sold to Howard A. Walter and wife (Am. Comp., Ex. A, p. 23); and at 118 Bruce Ave-

nue on Lot 5 in Block 3, sold to Roy N. Watne and wife (Am. Comp., Ex. A, p. 24), all in the Calhoun Lane Subdivision, were approved without exception and in all things by the Federal Housing Administration on the same dates and through the same officials and in the same manner as in the case of Leonard O. Apps.

Each of these approvals given by the Federal Housing Administration included specifically the acceptance of the construction of the unit in question by the Administration, and was only had after not one but several inspections made of each unit by officials of the administration. Particularly the final approval of each unit thus given by the Federal Housing Administration followed upon several inspections made during the course of the work and the final inspection after the construction had been completed. Every deviation from the original plans, specifications, description of materials, the specific conditions of the commitment and the applicable requirements was open, visible, and known to the inspectors for the Administration at the time of the inspections had and was in nowise concealed, but to the contrary was openly discussed. Accordingly any such deviation in every case was approved in writing by the Federal Housing Administration of the United States in the Compliance Inspection Report aforesaid covering the completion in each case of the unit involved.

There are three dwelling units mentioned in the amended complaint (Am. Comp., Ex. A, pp. 1, 5,

12) for which I have not been able to find any files, primarily because of intervening sales, the payment of the mortgage thereon, or for other like reasons. But in each of these cases as with the other units particularly mentioned in this affidavit and as well in the amended complaint there were like inspections and a final written approval of the construction by the Federal Housing Administration and all in form and language as with the dwelling sold to Leonard O. Apps and wife, as is "Exhibit A", hereto annexed.

By reference I incorporate "Exhibit A", which is attached to this affidavit, as a part hereof.

Specifically Rural Special Improvement District No. 73 of Yellowstone County, Montana, was duly created by the Board of Commissioners of Yellowstone County on or about November 8, 1946, for the purposes and as in Count II of the amended complaint alleged. Thereafter and after the completion of the improvements contemplated by the organization of the said district and on, to-wit, July 28, 1947, or thereabouts, the bonds of the said special improvement district were issued and delivered in payment of the work done and pursuant to a further resolution of the Board of Commissioners of the said county. Finally likewise by resolution of the said board and on, to-wit, October 15, 1947, the cost of these improvements in the sum of approximately of $24,375.49 was duly assessed against all the property within the said district, including specifically the twenty-four building units and the

lots on which the same are constructed as in the amended complaint described. The first installments of this assessment were payable for the year 1947, to-wit, on or before November 30, 1947. All these matters were public records.

The fact of this levy and assessment and the further fact that the improvements to which Count II of the amended complaint refers were to be paid by the levy and collection of these assessments against the properties within the district, including the dwelling units mentioned in the amended complaint, were known to the United States and to Ben F. Hill, its State Director of the Federal Housing Administration for Montana, and to the owners of these units here in controversy, viz., at least as early as October 29, 1947, when Mr. Hill attended a meeting at Billings, Montana, of persons interested in the matter.

But nevertheless thereafter and on February 24, 1948, the plaintiff through its Federal Housing Administration and the office of its State Director at Helena, Montana, approved nineteen of the twenty-one units mentioned in the amended complaint, for which this affiant has files, and as in this affidavit already recited. Further as is the best recollection of this affiant the plaintiff in like manner approved also and without exception the three of the remaining five units, for which files are not available, i.e., in all things as in "Exhibit A" to this affidavit annexed and in manner as that exhibit was executed specifically in approval of the dwelling unit sold

to Leonard O. Apps and wife as first in this affidavit recited.

The two dwellings sold to Leroy D. Jensen and wife (Am. Comp., Ex. A, p. 10) and to John H. Nickerson and wife (Am. Comp., Ex. A, p. 16), respectively, are the only units involved which were finally accepted and approved by the United States before those assessments were levied. Even in these two cases final approval was given by the plaintiff, however, after the district itself had been organized and the purpose made clear.

In short approval of these units as made by the plaintiff through its Federal Housing Administration was given with full knowledge of the incident of the lien or charge cast by the special improvement district assessments mentioned in Count II of the amended complaint, but without exception taken on that account or in any manner because of this lien and these assessments.

Accordingly, I say that the United States of America, the plaintiff in this suit, by its own agency and through its own officials clothed by it with authority in these matters inspected every unit or dwelling involved in this litigation, in all things fully and finally approved the construction of each such unit as completed, including the organization of Rural Special Improvement District No. 73, and the assessments laid upon these dwelling units to pay for these improvements, and accordingly ratified or approved in every particular and in writing any deviation in any unit from the original plans

and specifications, the description of materials, the specific conditions of the commitment, and the applicable requirements.

All the twenty-four dwelling units to which the amended complaint in this suit refers (Am. Comp., Ex. A, pp. 1-24, both inclusive) were constructed by this affiant and Jeff Tingle, another defendant, viz., as partners, who are commonly referred to as Hartwig and Tingle. The defendant, W. C. Jennings, was not a member of the partnership mentioned, and had no interest therein. He was at time the office manager for this affiant and as well his bookkeeper, who also managed the office and kept the books for A. W. Hartwig Construction Company, sometimes A. W. Hartwig Pipe Line Construction Co. The defendant, W. C. Jennings, built none of these buildings and used no materials had under the priority mentioned in the amended complaint either in the construction of any unit here in question or otherwise.

Originally the defendant, Jeff Tingle, with the defendant, W. C. Jennings, made application for the priority which was used in the construction of the units mentioned in the amended complaint. But the construction of these units under this priority was actually undertaken only by the said Jeff Tingle with this affiant as his partner. In this partnership or venture the defendant, W. C. Jennings, participated not at all, and shared none of the profits or losses. In short after the approval of this project as herein recited all the construction work was done

and carried on by Hartwig and Tingle, as appears with greater certainty likewise from "Exhibit A" to this affidavit annexed, to which further reference is made at this point, and which is again typical of all the twenty-four units here in controversy.

The defendant, Jeff Tingle, is presently out of the state of Montana; and accordingly neither this affiant nor the counsel for the defendants herein has been able to contact Mr. Tingle to secure from him his affidavit in this matter. For this reason alone the affidavit of Mr. Tingle is not submitted herewith.

/s/ A. W. HARTWIG.

Subscribed and sworn to before me this 25th day of January, 1951.

[Seal] /s/ T. R. BAILEY,
Notary Public for the State of Montana, residing at Billings, Montana. My commission expires March 25, 1951.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 27, 1951.

Note

Pages 82-83 missing or blank;
page 84 is blank.

[Title of District Court and Cause.]

AFFIDAVIT OF W. C. JENNINGS, DEFENDANT

United States of America,
State and District of Montana,
County of Yellowstone—ss.

W. C. Jennings, of lawful age, being first duly sworn, upon his oath deposes and says:

I am one of the defendants named in this action. I reside at Billings in Yellowstone County, Montana. By occupation I am an office manager or bookkeeper.

I am presently employed by A. W. Hartwig, Inc., a corporation of Billings, Montana, which is the successor to the business and affairs formerly carried on by A. W. Hartwig Construction Company, or A. W. Hartwig Pipe Line Company.

I have been employed by Mr. Hartwig and the corporation named for sometime, and was employed at the times referred in the amended complaint in this action as an office manager or bookkeeper, whose duties were to handle the correspondence, keep the books, make up payrolls, and attend to such clerical details.

I was never interested as a partner or otherwise in any of the projects undertaken by either Mr. Hartwig or the corporation. Nor did I ever have any interest at all other than one share of the capital stock of the present corporation, which I hold to qualify the corporation for business, and myself as a director.

However at the times mentioned in the complaint I did not have even this interest, because the present corporation was not then organized or in existence, and A. W. Hartwig Construction Company or A. W. Hartwig Pipe Line Construction Company as it was sometimes called was a fictitious name, viz., a corporate style under which A. W. Hartwig himself transacted business.

Moreover, during the construction of the dwelling units to which the amended complaint refers I had no connection with the work there other than to keep the books in the office of the construction company and for Mr. Hartwig. The construction of these units was, in other words, carried on wholly by Mr. Hartwig and Mr. Tingle, the other defendants in this suit, under the name of Hartwig and Tingle.

In February 1946 with Mr. Tingle I did make application for a priority to be used in the construction of these units. But at sometime thereafter so far as I was concerned the project was abandoned.

The application made in May 1946 for a renewal of this priority No. 6-093-269 was made by Mr. Tingle alone, although it was presented in our joint names, because the original priority here issued on February 19, 1946, was to both of us. Under the renewal of this priority itself dated May 11, 1946, the firm or partnership association of Hartwig and Tingle built the houses and alone made use of this priority in that construction.

During the times mentioned in the amended complaint in this suit my sole compensation was my

salary which was paid by A. W. Hartwig who did business then as A. W. Hartwig Construction Company or A. W. Hartwig Pipe Line Construction Company. No part of my salary nor any other compensation was paid by the partnership of Hartwig and Tingle or out of the project referred to in the amended complaint. No compensation or salary for me was charged against the partnership of Hartwig and Tingle or the project mentioned in the amended complaint. I did not appear on the payroll for that project at all and received no moneys of any kind therefrom.

/s/ W. E. JENNINGS.

Subscribed and sworn to before me this 26th day of January, 1951.

[Seal] /s/ T. R. BAILEY,
Notary Public for the State of Montana, residing at Billings, Montana. My commission expires March 25, 1951.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 27, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF BEN S. HILL

State of Montana,
County of Lewis and Clark—ss.

Ben S. Hill, being first duly sworn on oath deposes and says:

That at all of the times herein mentioned affiant has been and still is State Director of the Federal

Housing Administration for the State of Montana with offices at Helena, Montana.

That as the State Director of the Federal Housing Administration affiant has knowledge of the facts involved in the above entitled case insofar as the Federal Housing Administration is concerned.

That affiant has read the affidavit of A. W. Hartwig dated the 25th day of January, 1951, and filed herein. That the affidavit of A. W. Hartwig has reference to mortgage insurance applied for by the Security Trust & Savings Bank, of Billings, Montana, in accordance with the provisions of the National Housing Act. That in the issuance of mortgage insurance the Federal Housing Administration deals with the mortgagee and does not deal with the mortgagor, although information for the issuance of mortgage insurance is supplied by the mortgagor to the mortgagee, and in turn the mortgagee submits this information to the Federal Housing Administration. That a typical mortgagee's application for mortgage insurance on the properties involved in the above entitled case is the application made by the Security Trust & Savings Bank, copy of which is attached hereto and made a part hereof. That this application applies to Lot 8, Block 2, Calhoun Lane Subdivision, Billings, Montana, wherein it appears that A. W. Hartwig and Jeff Tingle are the mortgagors. That the application, copy of which is attached hereto, concerns one of the properties involved in the above entitled case. It affirmatively appears from the application for

mortgage insurance attached hereto that this application by the Security Trust & Savings Bank involves the same property as that property referred to in the Compliance Inspection Report attached to the affidavit of A. W. Hartwig as a typical property and which property was later purchased by Mr. and Mrs. Apps.

Appearing on the third page of the application the question is asked as to whether or not there are any special assessments outstanding and the answer appearing is "None". The further question is asked as to whether there are any installments for special assessments, the amounts payable, this is left unanswered. The amount of estimated yearly taxes when assessed and the construction completed is stated to be $30.00. On the face of it the taxes would of necessity be greater if it was intended to encumber the dwellings in the Calhoun Lane Subdivision with the special improvement tax. It further appears on the first page of the application by Question No. 12 "Have you incurred or do you intend to incur any indebtedness, secured or unsecured, other than that of the mortgage loan applied for, for any purpose connected with this transaction?" The answer to that question is "No". That is part of the mortgagors statement made in connection with, and support of the mortgagee's application for mortgage insurance. The foregoing answers to the questions propounded lead the Federal Housing Administration and particularly the officers and employees of the Montana State Office to believe that there would be no special improve-

ment levy made that the purchasers would be required to pay on the dwellings when they were purchased by veterans who were designated as eligible purchasers in the first instance.

In addition to the foregoing information there had been submitted to the Federal Housing Administration in order to interest the Government in granting mortgage insurance in the new subdivision a Subdivision Information Form which form was filed by A. W. Hartwig for Hartwig and Tingle. Attached hereto and made a part hereof is a copy of the Subdivision Information Form submitted. In that form the question is asked (under No. 7) "Are all contemplated street and utility improvements to be installed by developer and included in the sale price?" The answer is "Yes." The question is further asked, "What Special Assessments will purchasers be required to pay?" The answer to that question is "None". This information having in due course been submitted to the Federal Housing Administration was intended to convey a meaning, and did convey a meaning, to affiant and other officers, employees, and representatives of the Federal Housing Administration that there would be no special assessments levied against the purchasers. That understanding was clear and was never altered so far as the Federal Housing Administration is concerned and at no time has the Federal Housing Administration approved the action of Messrs. Hartwig and Tingle with respect to the special assessments, either by Compliance Inspection Reports, or otherwise.

Our compliance inspections of properties under construction are made for our own information and for our sole benefit. It is through such inspections that we determine when and whether we think a property under consideration is eligible for mortgage insurance. If we think it is, then we indicate on the Compliance Inspection Report form that insofar as we are concerned the building improvements have been acceptably completed and that the mortgage papers may be sent to us for insurance endorsement. We send the original of this Compliance Inspection Report (Form 2051) to the mortgagee for its information. We do not send a copy of it to the contractors or builders, because our relations in the processing of an application for insured loan are entirely with the lending institution that agrees to make a certain loan provided we will insure it. Our compliance inspections are not intended in any way to take the place of architectural supervision, and when we give our final approval to a residential property, we do not release in any way any contract or agreement which may exist between the contractor and the purchaser of a property which our inspection may cover or which may exist between the contractor and any other interested party.

The Hartwig affidavit erroneously alleges that when we issue a Compliance Inspection Report (Form 2051) and by it indicate that we consider the building improvements to have been satisfactorily completed, and when we state in the form that the closing or mortgage papers may be sent to us for

insurance endorsement, that through this action and by this means we accept everything that has to do with the property as having been satisfactorily completed and approved—including special improvement taxes. That conclusion in the affidavit, however, is entirely and wholly untrue.

The Calhoun Lane properties were built of materials, most of which were allotted through the issuance of priorities. As agent for another Government activity, we processed applications for Montana, and we processed the priority application which had to do with the Calhoun Lane houses. The Hartwig affidavit is entirely and wholly in error in concluding as it does that through the final Compliance Inspection Reports that we issued on the Calhoun Lane houses, we thereby approved the inclusion in the sales price of these houses the amount of the unpaid special assessments against such properties.

In the case of the Calhoun Lane houses, our final Compliance Inspection Reports had absolutely nothing to do with clearing the builder, who had received the priority to build, from any violations of priority regulations of which he might be guilty.

Affiant attended a meeting in Billings, Montana, on October 6, 1947, which date was very soon after affiant had for the first time been informed by the Security Trust & Savings Bank, of Billings, Montana, that special assessments in connection with the Calhoun Lane houses had become liens on the properties. On October 29, 1947, affiant attended

another meeting in Billings, Montana, concerning the special assessments.

It is true that both of these dates in October of 1947 were before we endorsed most of the mortgage notes in connection with the Calhoun Lane houses for insurance. It is true that we went right on with our processing operations after we learned that there were unpaid special assessments on the properties concerned. But the essential point is that we did not know, before we issued our commitments to the Security Trust & Savings Bank of Billings covering the Calhoun Lane houses, that there were to be any unpaid special assessments.

After we had issued our commitments to the bank mentioned, we could not withdraw them or cancel them, nor could we change them in any respect. Once issued, a commitment is binding for the term on our agency, unless through fraud on the part of the mortgagee, it may be declared null and void. There was no fraud, nor any attempted fraud, on the part of the bank mortgagee in the Calhoun Lane properties, none so far as the Federal Housing Administration was able to learn, accordingly we were bound by the commitments that the bank held from us and we could in no way alter them. This point does not seem clear to A. W. Hartwig in his affidavit, but is basic. Before we issued the commitments to the Bank, we had no knowledge whatsoever that special assessments were to attach to the properties, and we are confident that the bank had no such knowledge, either. All knowledge that there were to be any special assessments was evidently

withheld until after our commitments had been issued and the Security Trust & Savings Bank had invested considerable money in the construction of the houses.

/s/ BEN S. HILL.

Subscribed and sworn to before me this 8th day of March, 1951.

[Seal] /s/ BEN R. DRAPER,

Notary Public for the State of Montana, residing at Helena, Montana. My commission expires Aug. 27, 1952.

Form No. 2084 (Issued June 1940)
Federal Housing Administration

SUBDIVISION INFORMATION FORM

Please Fill in All Blank Spaces

Kindly submit with exhibits in duplicate to insuring office at Helena, Montana.

Date submitted: May 18, 1946.

Name of subdivision: Calhoun Lane.

Location of subdivision: West of Billings, Mont. City: Billings, Mont.

Present sponsor of development: Hartwig & Tingle, Fratt Bldg., Billings.

The above-named sponsor is [x] Fee owner; [ ] Contract purchaser; [ ] Option holder; [ ] Owner's representative. Number of applications for mortgage insurance being made at this time..... [ ] No applications for mortgage insurance are being filed at this time, but a building program predicated upon the use of mortgage insurance is contemplated, and therefore a letter of advice and suggestions is requested.

The proposed improvements set forth below will be made by the undersigned. If not, explain.....

Important Instructions: (Please read carefully).

The Federal Housing Administration does not render opinions as to the eligibility of any subdivision, and areas are neither approved nor disapproved under any circumstances. Definite requirements relating to a specific site in a subdivision can be given only in connection with an application for mortgage insurance involving that site. A commitment issued in such a case will carry as "condi-

tions" all of the Federal Housing Administration requirements, if any, relating to the eligibility of the site involved in the application. When requested by the sponsor, this Administration will make suggestions for the improvement of an undeveloped subdivision when no application for mortgage insurance is involved. However, such suggestions are not to be construed as approving sites in any area. The eligibility of a site is considered only when an application for mortgage insurance is submitted.

Two Copies of the Following Exhibits Are Required To Be Submitted With This Report.

1. City, county or zoning map showing outline of tract, zoning of tract and surroundings, nearest schools, churches, parks, playgrounds, main traffic arteries, public transportation lines, local shopping and employment centers. Show dedicated streets to which proposed streets will connect, and proposed changes, if any, for major traffic ways.

2. Certified copy of protective covenants now in effect or copy of proposed covenants.

3. Preliminary subdivision plan marked so as to indicate exact boundaries of land under sponsor's control and area to be developed immediately. Mark in colors so as to distinguish (a) vacant lots deeded; (b) lots sold under contract; (c) business plots; (d) lots now improved with houses; (e) lots now controlled by sponsor of the subdivision; (f) lots upon which houses are to be constructed immediately. Label all streets. Indicate location and width of dedicated and required streets abutting the tract. Also indicate width, type, and condition of road surfacing on all existing streets and whether curbs, paved

gutters, and sidewalks exist. Indicate location and size of sewer, water, gas and electric lines to be extended and to which connections will be made, or distance and direction of each. (All symbols used should be clearly identified in a legend on each plan.)

4. Topographic survey or sufficient data to show how subdivision plan relates to existing grades, drainage, and to the location of all natural features such as preservable trees, woodland, rock outcrop, watercourses, etc.

5. Photographs of existing structures, streets, and open lands in and surrounding the tract—clearly identified and keyed to subdivision plan.

1. General:

(a) Total area of subdivision: 10 acres. Number of residential lots: 33. Number of business lots: none.

(b) Area to be developed immediately: 7½ acres. Number of residential lots: 27. Number of business lots: none.

(c) Sponsor's estimate of value of land in present condition is $1,000.00 per acre, or $500 per lot.

(d) Date lots offered for sale: none. Residential lots sold: none. Business lots sold: none.

(e) Lots sold and paid for: none. Lots under contract: none. Contracts in default: none.

(f) Lots now controlled by sponsor: 27.

(g) Lots now built upon: none. Residential: none. Business: none.

(h) Is plat recorded? Yes. When? May 8, 1946.

(i) Has subdivision plan been approved by official planning authorities? Yes. When? May 8, 1946.

(j) Blanket mortgage: none. Due date: none. Release price per lot: none. Delinquency $.....

(k) Is mortgage subject to protective covenants? ..... Can it be subordinated to protective covenants? .....

(l) Tax delinquency on lots controlled by sponsor: none. Plan of liquidation: .....

(m) Number of homes to be built immediately to order: 27. For sale: Yes.

(n) Type of dwellings proposed (single-family detached, semidetached, etc.): single family.

(o) Price range existing homes: none. Price range proposed homes: $6,000.00. Price range vacant lots: $600.00 to $1,000.00.

(p) Outline selling and improvement program contemplated to build: 27 $6,000.00 homes.

(q) Outline experience of sponsor in this type of development: War housing.

2. Protection:

(a) Are protective covenants recorded against all lots? Yes. When? ——. Or are they imposed in individual deeds? Yes.

(b) How do local zoning regulations, if any, limit use of property? None.

(c) To what use is property surrounding this subdivision restricted or zoned? None.

(d) Describe any nonresidential use of surrounding property: farming.

(e) To what percentage are immediate surroundings built upon the north? ..... * * *

3. Special Hazards:

(a) Land is [x] Flat. [ ] Low. [x] Wooded.

[ ] Rolling. [ ] Hilly. Type of subsoil: clay loam.

(b) Does it require drainage? no. Describe area filled or to be filled.....

(c) Describe any land now unsuitable for building: none.

(d) Which streets carry heavy or fast traffic? none.

4. Civic, Social, and Commercial Centers:

(a) Distance to main metropolitan center: 1.8 miles. To local community center: 4 blocks.

(b) To local shopping center: 4 blocks. To park and playground: 1 block.

(c) To grammar school: 1 mile. To high school: 12 blocks.

(d) To churches: 1.4 miles. To theatres .....

(e) Is free transportation to schools provided? Yes.

5. Transportation:

(a) Types of transportation to metropolitan center: Buss.

(b) Distance to public transportation: 1 block.

(c) Frequency of service to metropolitan center: every hour. Time consumed: 10 min. Cost: 10c.

(d) Is private transportation necessary? .....

6. Utilities and Conveniences:

(a) Tract will be provided with: [x] Electricity; [x] Gas. [x] Telephone. Water supply from: [x] Municipality, [x] Public Utility, [ ] Small local company. [ ] Private well. Sewage disposal by: [ ] Public mains, [x] Private septic tanks, [ ] Other means. The following services: [ ] Garbage removal, [ ] Snow removal, [ ] Police Protection,

[ ] Fire protection, [ ] Street Lighting, [ ] Storm water sewers.

(b) Give description of contemplated street improvements and utilities: gravel and oil mix; water and gas being brought in.

(c) List streets which are now improved and describe improvements .....

(d) What streets are dedicated to and maintained by municipal authorities? all streets.

(e) List any streets not to be publicly maintained and describe plan of maintenance: .....

7. Taxes and Special Assessments:

(a) What is tax rate? ..... Assessed valuation in relation to proposed sale prices? .....

(b) What special assessments will purchasers be required to pay? none.

(c) Are all contemplated street and utility improvements to be installed by developer and included in sale price? Yes.

(d) What is approximate cost per front foot of contemplated utilities and improvements? 3.50.

Appeal:

(a) Describe existing or proposed planting or landscape improvements (street trees, entrance features, screen planting, neighborhood park, etc.): none.

Remarks: .....

The undersigned represent that to the best of their knowledge and belief the statements, informa-

tion, and conditions contained herein are true and correct, and the required exhibits are attached hereto in duplicate.

/s/ HARTWIG & TINGLE,
By A. W. HARTWIG, part.

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF H. L. WHITE

United States of America,
State and District of Montana,
County of Yellowstone—ss.

H. L. White, of lawful age, being first duly sworn, upon his oath deposes and says:

I am vice-president of Security Trust & Savings Bank, a corporation organized under the laws of Montana, with its principal place of business at Billings, Montana. During the years 1946 and 1947 I was cashier of said bank, and in that capacity handled for said bank the loans on dwelling units in the Calhoun Lane Subdivision near Billings, Montana.

On or about May 18, 1946, the Security Trust & Savings Bank submitted to the Federal Housing Commissioner, through the State Director of Federal Housing Administration in Helena, Montana, applications for the insurance of various mortgage loans to A. W. Hartwig and Jeff Tingle, who were then engaged in the construction of various dwell-

ing units in said Calhoun Lane Subdivision. These applications were accompanied by plans and specifications and other required information furnished to said bank by the said Hartwig and Tingle. Thereafter said applications were approved, and what is known as operative builder's commitments were issued. No Federal Housing Administration loans were closed, however, on this basis, and pursuant to these commitments.

Thereafter the said Hartwig and Tingle entered into contracts with various purchasers for the sale of said dwelling units. Acting for said bank, I submitted to the Federal Housing Administration the applications of the bank for insurance of mortgage loans to said purchasers as owner-occupants, transmitting with the applications the original commitments to the operative builder. In turn, the bank received from the Federal Housing Administration commitments for loans to the various owner-occupants, whereupon acting for said bank I closed the loans with these purchasers.

This procedure may be illustrated by reference to the loan made to Leonard O. and Regina T. Apps. Attached hereto, marked Exhibit A, is a photostatic copy of the original application for mortgage insurance on loan to A. W. Hartwig and Jeff Tingle dated May 18, 1946, to be secured by a mortgage on Lot 8 in Block 2 of Calhoun Lane Subdivision. This application was approved and commitment issued, but no Federal Housing Administration loan was closed while the property belonged to Hartwig and Tingle. On May 8, 1947, Hartwig & Tingle en-

tered into a contract for the sale of this lot to Leonard O. and Regina T. Apps, for the sum of $8,000, with a down payment of $500 and an agreement to pay the balance "upon approval and acceptance of a Federal Housing Administration commitment for $5,900.00, and a second mortgage approved and guaranteed by the Veterans Administration for $1,600." On May 9, 1947, the bank submitted to the Federal Housing Commissioner its application for mortgage insurance on a loan for $5,900.00 to Leonard O. and Regina T. Apps. Attached hereto, marked Exhibit B, is a photostatic copy of the bank's copy of this application, with mortgagors' statement, which is complete except for a part of the date and the signatures of the mortgagors and the officers of the bank. The original of this application was typed, dated, signed and sent to the State Director of Federal Housing Administration. On the same date there was submitted to the Veterans Administration an application for approval of a second mortgage of $1,600.00. Notes and mortgages were executed by Mr. and Mrs. Apps on May 29, 1947. The note for $5,900.00 was sent to the State Director of Federal Housing Administration, and on June 11, 1947, the note was returned to the bank endorsed for insurance by the State Director. On the same date the deed from Hartwig & Tingle to Mr. and Mrs. Apps, and the two mortgages, were recorded.

The same procedure was followed with respect to the other loans.

In connection with a loan by the Bank to Hart-

wig and Tingle, the Bank received a master abstract covering all of the property where said dwelling units were constructed, and submitted the same to its attorneys, Coleman, Jameson & Lamey, for their examination. Attached hereto, marked Exhibit C, is a copy of the opinion of said attorneys on said abstract dated July 3, 1946.

All of the loans with the respective purchasers were closed between approximately February 1, 1947, and July 1, 1947. When each loan was closed, the deed to the purchaser and mortgages to the Security Trust & Savings Bank were recorded, and the funds disbursed. In connection with some loans, however, certain sums were held back by the bank at the request of the Federal Housing Administration on its Form 2300, Mortgagee's Assurance of Compliance, pending compliance with certain requirements specified in said forms.

After each loan was closed, the Bank obtained a final opinion from its attorneys, Coleman, Jameson & Lamey. Attached hereto, marked Exhibit D, is copy of the opinion of said attorneys dated June 13, 1947, in connection with the Leonard O. and Regina T. Apps loan. The opinions in connection with other loans were in substantially the same form.

I do not recall that any representations were ever made to me with respect to any special improvement district assessments which might be a lien against said properties.

In August, 1947, one of the original purchasers, William A. Crutcher, negotiated a sale of Lot 9 in Block 2 of Calhoun Lane Subdivision to Richard J.

Gardner, and Gardner applied to the bank for a new loan. In connection with this sale and loan, I called the county treasurer and county assessor of Yellowstone County to ascertain the amount of the 1947 taxes, and was advised by both of them that a rural special improvement district had been created, and that assessments thereof were a lien against this property. The contract between Crutcher and Gardner is dated August 13, 1947, and I called the county assessor and county treasurer and received this information either on that date or within a few days prior or subsequent thereto. This was the first time I knew that any special improvement district assessment would be a lien against any of the properties in Calhoun Lane Subdivision, except for a small assessment in Rural Special Improvement District No. 37, referred to in our attorneys' opinion of July 3, 1946.

Rural Special Improvement District No. 37 had been created some years before for water.

The property platted in the Calhoun Lane Subdivision was included in this district with other property. Most of the assessments had been paid and the amounts of the unpaid assessments which were a lien against these lots, amounted to only a few dollars. I do not recall the exact amount. This district paid out in 1948.

In particular I had no knowledge prior to my conversations with the county assessor and county treasurer of any assessments or levies pursuant to the establishment of Rural Special Improvement District No. 73. As stated above, I handled all of

these loans for the bank, and to the best of my knowledge and belief, no other officer of the bank had any knowledge of any assessments under Rural Special Improvement District No. 73 prior to my conversations with the county assessor and county treasurer of Yellowstone County, Montana, as aforesaid.

/s/ H. L. WHITE

Subscribed and sworn to before me this 22nd day of March, 1951.

[Seal] /s/ W. J. JAMESON,

Notary Public for the State of Montana, residing at Billings, Montana. My commission expires August 10, 1952.

[Printer's Note: Exhibit A is a duplicate of Mortgagee's Application for Mortgage Insurance reproduced at page 95 to 98 with exception of page one of Mortgagors' Property Description which follows.]

Note

Pages 113 - 116 are missing.

EXHIBIT "C"

Coleman, Jameson & Lamey
Attorneys at Law
Electric Building, Billings, Montana

July 3, 1946

Security Trust & Savings Bank,
Billings, Montana

Gentlemen:

At your request we have examined Abstract of Title No. 42643, last certified by the Abstract Guaranty Company on the 10th day of May, 1946, at 8 o'clock a.m., covering the following described real estate situated in Yellowstone County, Montana:

> Lot Eleven (11) in the Northwest Quarter (NW¼) of Section Nine (9), in Township One (1) South, Range Twenty-six (26) East, M.P.M., Excepting, therefrom, rights-of-way for public roads, irrigation or drainage canals.

Subsequently we examined a supplemental abstract which was last certified by the Abstract Guaranty Company on the 2nd day of July, 1946, at 10:31 o'clock a.m., covering the following described real estate situated in Yellowstone County, Montana:

> Lots One (1) to Eighteen (18), both inclusive, in Block Two (2), and Lots One (1) to Nine (9), both inclusive in Block Three (3) of Calhoun Lane Subdivision, situate in Lot 11, in the NW¼ of Sec. 9, Twp. 1 S., Rge. 26 E., M.P.M., according to the plat thereof, on file

and of record in the office of the County Clerk and Recorder of Yellowstone County, Montana.

From our examination it is our opinion that the title to the lands described in the supplemental abstract stands in the name of Jeff Tingle and Arthur W. Hartwig, subject to the following exceptions and reservations:

1. The usual patent reservations.

2. Mortgage from Arthur W. Hartwig and wife and Jeff Tingle and wife to the Security Trust & Savings Bank of Billings, Montana, securing a loan not to exceed the aggregate of $81,000.00, dated June 27, 1946, as shown at pages 8 and 9 of the supplemental abstract.

3. Rights and reservations of the Northern Pacific Railway Company, as the same appear in its deed to the Minnesota and Montana Land and Improvement Company, shown at page 2 of abstract No. 42643.

4. The name of the grantor, Minnesota and Montana Land and Improvement Company, a corporation, does not appear above the signature of the officers. However, the acknowledgment shows that the deed was executed for the Minnesota and Montana Land and Improvement Company by its officers. This objection may therefore be waived.

5. Taxes for the year 1946, which are a lien but not yet due.

6. The lands are assessed in Rural Special Improvement District No. 37, and are subject to assessments thereunder.

The plat for Calhoun Lane subdivision was not shown in the abstract. However, we have been furnished with a copy of the plat by Mr. Hartwig, who assures us that it is a copy of the one filed with the clerk and recorder.

Very truly yours,

COLEMAN, JAMESON & LAMEY
By A. F. LAMEY

AFL:mem

EXHIBIT "D"

Coleman, Jameson & Lamey
Attorneys at Law
Electric Building, Billings, Montana

June 13, 1947

Mr. H. L. White
Security Trust & Savings Bank
Billings, Montana

Dear Mr. White:

Please refer to our opinion of July 3, 1946, with reference to Lots 1-18 inclusive in Block 2 and Lots 1-9 inclusive in Block 3 of Calhoun Lane Subdivision.

We have now examined an unnumbered abstract, and continuations thereof, prepared by Abstract Guaranty Company of Billings, Montana, consisting in all of 112 pages, last certified June 11, 1947, at 12:17 o'clock p.m., covering Lot 8 in Block 2 of Calboun Lane Subdivision. From our examination thereof it is our opinion that as of the date last

certified, title to said Lot 8 was vested in Leonard O. Apps and Regina T. Apps, husband and wife, as joint tenants with right of survivorship, free and clear of all liens, encumbrances and defects except as follows:

1. The items referred to in paragraphs 1, 3, 4 and 6 of our opinion of July 3, 1946.

2. Right of way easement to The Montana Power Company for the construction, maintenance, operation and removal of an electric distribution system, together with the right of egress and ingress with motorized equipment.

3. Taxes for 1946 and prior years have been paid. Taxes for 1947 are a lien.

4. Mortgage dated May 29, 1947, in the amount of $5,900 to Security Trust & Savings Bank of Billings, Montana, which is a first lien on said Lot 8, subject only to the foregoing items.

5. Mortgage dated May 29, 1947, in the amount of $1,600 to Security Trust & Savings Bank of Billings, Montana, which is a second lien on said Lot 8, subject only to the foregoing items.

Very truly yours,

COLEMAN, JAMESON & LAMEY

By JAMES H. KILBOURNE

James H. Kilbourne

JHK:mem

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

EXCERPT FROM DEFENDANTS' BRIEF IN REPLY TO MOTION FOR SUMMARY JUDGMENT

Since the first brief for the defendants upon these motions was filed and served the defendant W. C. Jennings has died. As to him then the cause is thus at an end. The plaintiff's motions at bar then are before the Court in any case only as to the defendants Hartwig and Tingle.

* * * * *

Respectfully submitted,

/s/ HORACE S. DAVIS,
Attorney for Defendants.
BROWN, DAVIS & HANSON,
WILLIAM H. BELLINGHAM,
/s/ By HORACE S. DAVIS,
Attorneys for Defendants.

[Endorsed]: Filed April 26, 1951.

[Title of District Court and Cause.]

DECISION AND ORDER OF THE COURT GRANTING MOTION TO STRIKE AND GRANTING MOTION FOR SUMMARY JUDGMENT

The questions before the court at this time arise on the motion of plaintiff in the above-entitled cause to strike certain portions of the answers filed by the defendants, and also on plaintiff's motion for

summary judgment upon part of the plaintiff's claim as set forth in the amended complaint. (Rules 12 and 56 of the Federal Rules of Civil Procedure).

The court has considered the ten specifications of grounds upon which the motion to strike is based, likewise the specific grounds set forth in plaintiff's motion for summary judgment. As it now appears, the court has already passed upon the questions raised in plaintiff's motion to strike in the decision filed herein on October 4th, 1950, in ruling on the motion of defendants to dismiss the said action, so that in the interests of brevity and to avoid unnecessary further consideration of these same questions, and in view of the fact that no re-examination of these questions has ever been applied for or ordered, and being duly advised and good cause appearing therefor, the court will accordingly summarily grant the plaintiff's motion to strike those certain portions of the answers filed by the defendants which are particularly described in the motion.

The next question to be considered arises on plaintiff's motion for summary judgment on a part of plaintiff's claim set forth in the amended complaint, and for a mandatory injunction and order directing the defendants to make restitution to each of the purchasers named in "Exhibit A", attached to the complaint, by paying and satisfying the special improvement levy or tax made by Yellowstone County, State of Montana, against each of the dwellings referred to in the amended complaint and designated therein and also in the answers filed herein by the defendants, as Rural Special Im-

provement District No. 73 for water mains, sewers, concrete curbs, gutters and oil mix pavement, or in the alternative, if it should be found that any of said purchasers have paid the special improvement levy or tax against a particular dwelling, then the order direct that the purchaser be reimbursed in the amount of the tax lien paid by him.

It is contended by plaintiff that there is no genuine issue as to any material fact relating to said special improvement levy or tax and that as a matter of law the plaintiff is entitled to judgment. It appears in both amended complaint and answers filed that Yellowstone County established and approved Rural Special Improvement District Number 73 and that the real property within said Improvement District No. 73 was regularly assessed for the improvements therein and that the said property lying within said Improvement District 73 has been impressed with a lien for the said special improvements, and the answers aforesaid refer to the provisions of Section 944.54 (g)(ii) of Priorities Regulation 33, which is in the following language: "(ii) a builder must not sell a one family dwelling built * * * under the Re-Conversion Housing Program including the land and all improvements (including garage if provided) for more than a maximum sales price specified in the application * * *."

There seems to be no question that the defendants, Hartwig and Tingle, have practically admitted in the answer that the dwellings mentioned in the amended complaint were sold in excess of the max-

imum price established, and that these defendants were responsible for having the special improvement levy assessed against each individual purchaser; all of which appears to have been an additional charge added by them to the maximum price established.

It appears from the application for mortgage insurance that there would be no indebtedness other than the mortgage loan applied for, which would indicate to the Federal Housing Administration and the bank in question that the purchasers of the dwellings under the project would have no special improvement tax assessed against their property; also to the same effect the answers of defendant Hartwig under item No. 7 of the sub-division Information Form submitted to Federal Housing Administration for the issuance of mortgage insurance, in which he said that purchasers of the dwellings would be required to pay no special assessments, and that all contemplated street and utility improvements to be installed by developer were included in sale price. This court decided on the defendants' motion to dismiss that the maximum price established under the provisions of Priorities Regulation 33 must include the land upon which the dwelling is situated and all improvements.

The answer of the defendants, Hartwig and Tingle, alleges that the plaintiff accepted the said dwellings so constructed and completed as in full conformity with the specifications, descriptions and plans, and in full performance of their contract, and in full satisfaction and in full discharge of every obligation of the defendants, or either of

them. if any officer or agent of the Government had any authority to make the settlement alleged, as a defense interposed by defendants, it was not made in the due performance of his duty or within the scope of his authority when it appears that it was made in violation of the law and of the covenant with the Government which provided that there should be included in the sale and maximum price all the land and improvements.

The covenant of the defendants with the Government was made with the knowledge and understanding that one who obtained priorities could sell a dwelling for a given price, including the land and all improvements, and this was clearly a covenant made in the public interest. Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals in the latter category are in many cases bound by the acts and declarations of their agents even where the act or declaration was done or made without any authority, if it appear that the act was done or declaration made by the agent in the course of his regular employment; but the Government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, which does not so appear in this case, as no agent can charge the Government with a settlement in open violation of law. Reasons for the application of such a holding are much more patent in the case of contracts of the Government than of contracts of individuals; for the Government must necessarily rely upon the acts of agents, whose

ignorance, carelessness, or unfaithfulness might otherwise bind it, to the serious injury of its operations. It might further be said in this connection that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. (Utah Power & Light Co. v. United States, 243 U.S. 389, 408, 409.)

In connection with the position taken by the court as above indicated, a quotation from the affidavit of Ben S. Hill, State Director of the Federal Housing Administration for Montana, would be relevant, and which is in the following language: "* * * at no time has the Federal Housing Administration approved the action of Messrs. Hartwig and Tingle with respect to the special assessments, either by Compliance Inspection Reports, or otherwise * * * in the case of the Calhoun Lane Houses, our final compliance inspection reports had absolutely nothing to do with clearing the builder, who had received the priority to build, from any violations of priority regulations of which he might be guilty."

Counsel cite a case from the Court of Appeals for the Ninth Circuit showing a party may attempt to raise an issue of fact in the pleadings, and stating the purpose of Rule 56 as follows: "The purpose of the procedural Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A., providing for the rendering of summary judgment is to dispose of cases where there is no genuine issue of fact even though an issue may be raised formally by the

pleadings." Kouke v. Fontecchio, 177 F. (2) 125, 127.

The court has considered the motion for summary judgment, the briefs of counsel, affidavits filed herein, and the law and authorities deemed applicable, also the court's former decision of October 4th, 1950, and in view of the foregoing, is now of the opinion that the motion for summary judgment in respect to the aforesaid special improvement tax or levy, as a matter of law, no genuine issue of fact appearing, should be granted, with plaintiff's costs herein, and such is the decision of the court in said cause.

It is further ordered that a mandatory injunction issue, as prayed for, requiring the defendants, A. W. Hartwig and Jeff Tingle, to satisfy the levy or tax made against the dwellings referred to in the amended complaint, on file herein, by paying and satisfying the assessment made by Yellowstone County pursuant to Rural Special Improvement District No. 73, or if any of the persons named in "Exhibit A", attached to the amended complaint, have paid the special improvement levy as it affects the particular dwelling purchased, then they shall restore to said purchaser the amount expended by him in satisfying the said special improvement levy or tax, and such is the order and decision of the court herein. Exceptions allowed defendants.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed July 30, 1951.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Before Honorable Charles N. Pray, at Billings, Montana, on September 6, 1951, morning session.

Emmett C. Angland, Assistant U. S. Attorney.

Mr. Angland: Now there is one other matter, your Honor, I thought I might call to the attention of the Court. It is the first case on the trial calendar, United States vs. A. W. Hartwig, et al. In that case the court on July 30th or 31st handed down the decision sustaining the motion of plaintiff for summary judgment. Now in reviewing the Rules the question of the entry of judgment on that decision comes under Rule 54b; we have a provision there whereby judgment could be entered, however, I note Mr. Davis isn't here and I thought I might submit this to the court, this proposed order and see that Mr. Davis is furnished with a copy and be given an opportunity to submit a memorandum if he opposes it.

Now I want to call the court's attention to the fact that Rule 54(b) provides there must be in order to enter judgment an express determination that there is no just reason for delay and express direction for entry of judgment. Well I know of no reason for delay; this decision of the court and the judgment disposes of a part of this case and I don't know why the entry of judgment on that part of the case should be delayed. Now, as I say, I don't like to appear to be taking any advantage of the absence of Mr. Davis.

The Court: The other part of the case relates to all of those various houses, some 30, aren't there?

Mr. Angland: 24.

The Court: 24.

Mr. Angland: Actually it would amount in the trial of 24 separate lawsuits when it came to introducing evidence, and I am of the opinion, I had hoped Mr. Davis would be here because I had hoped to suggest as I suggested in my motion for summary judgment for appointment of a Master. I think going through that evidence will consume a good deal of time. The law of the case has been decided.

The Court: In the light of the decision on it because of the volume of evidence that a Special Master should be appointed and take the evidence and make recommendations to the court.

Mr. Angland: I think that is particularly true because the law has been decided by the two decisions of the court. The case is strictly a question of fact; I don't believe there is a law question in it.

The Court: I don't see any reason why we should put in two weeks taking testimony in that case.

Mr. Angland: I think it might well take two weeks.

The Court: When will Mr. Davis be back?

Mr. Angland: I spoke to Mr. Hanson and he won't be back until Monday.

Mr. Hanson: Monday morning.

The Court: Well I think the Federal Power Commission has a hearing here Monday morning.

Has anyone heard anything about it? I gave them permission for next Monday morning.

The Clerk: Mr. McBride, the Chief Engineer, said they were expecting them.

The Court: So we couldn't take it up with Mr. Davis Monday morning; we will have to conclude.

Mr. Angland: If your Honor has any reason to stay it won't make any difference to me; I have to be in Jordan.

The Court: We will wait and see if we could make some arrangement to dispose of it.

Mr. Angland: I won't present this order at this time; actually I would rather have Mr. Davis here.

The Court: We will give him an opportunity to examine the order and write a memorandum.

Mr. Angland: I will give a copy to his Associate and if we do stay until Monday, we can take it up.

The Court: Gentlemen, have you some cases on the civil calendar you would like to call the court's attention to, and see about trial later on.

Certified true and correct record in above case.

/s/ SIDNEY O. SMITH,
Official Court Reporter.

[Endorsed]: Filed January 16, 1952.

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED SUMMARY JUDGMENT STYLED "ORDER ON MOTION FOR SUMMARY JUDGMENT"

Come now the defendants A. W. Hartwig and Jeff Tingle by their counsel and without consenting to the entry of any judgment summary or otherwise herein against them, or either of them, and without waiving their opposition to the plaintiff's motion herein for summary judgment object here to the form of the judgment now proposed and to the order on motion for summary judgment now submitted as follows, to-wit:

1. The said summary judgment or order as so proposed should specify in paragraph 2 thereof the specific amounts which the defendants A. W. Hartwig and Jeff Tingle are thereby required to pay in satisfaction of the levy or tax laid pursuant to Rural Special Improvement District No. 73 against each tract or parcel of real estate in the said paragraph specifically described, the aggregate of which payments presumably is the sum of $28,124.17, which is expressed in paragraph 1 of the said judgment or order as proposed.

2. The said summary judgment or order so proposed should expressly recite that compliance by the defendants, or either of them, with paragraph 2 or paragraph 3 thereof will constitute satisfaction in full of the judgment for $28,124.17 which is in paragraph 1 awarded the United States as plaintiff.

3. The said summary judgment or order so proposed should not include the award of any costs in the action other than such as have been incurred under the second count in the amended complaint contained for that the cause yet pends undetermined upon the first count in the said amended complaint as to which at this time no costs may properly be awarded therefore to any party.

Dated: September 11, 1951.

/ /HORACE S. DAVIS,
Attorney for Defendants, Hartwig and Tingle.
BROWN, DAVIS & HANSON,
WILLIAM H. BELLINGHAM,
BEN N. FORBES,
/s/ By HORACE S. DAVIS,
Attorneys for Defendants, Hartwig and Tingle.

Acknowledgment of Service attached.

[Endorsed]: Filed September 12, 1951.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Before Honorable Charles N. Pray, at Great Falls, Montana, on September 26, 1951, morning session.

Emmett C. Angland, Assistant U. S. Attorney.

Mr. Angland: Now I have one other matter, your Honor, and that is No. 1089, United States vs. Hartwig and Tingle.

The Court: What do you have on that—a Billings case?

Mr. Angland: Yes.

The Court: Now what about that?

Mr. Angland: You requested when we were in Billings a short while back I give a copy of a proposed order on the motion for summary judgment to Mr. Davis' Associate, Mr. Norman Hanson. When Mr. Davis returned to Billings I wasn't able to contact him before I left there, but he wrote me a letter under date of September 7th and at the time enclosed copy of objections to the proposed order, and he filed those objections, thinking I had filed the proposed judgment, and I hadn't in fact filed it. Upon reading his objections I changed the form of the judgment to comply in substance with everything that he has said. I don't think there is anything that is very serious that I haven't complied with, and I wrote Mr. Davis on September 15th a rather lengthy letter and enclosed a copy of the amended form, a new one, it isn't actually amended because the original was never formally presented to the court, and I have never received a response and I asked him to advise me if he had any objections and I have not heard from him.

The Court: What date did you write him?

Mr. Angland: September 15th; that is eleven days ago.

The Court: This is the 26th.

Mr. Angland: I thought it would be appropriate for me to present the proposed judgment to the court now.

The Court: Very well.

Mr. Angland: I haven't included costs in there, your Honor. Mr. Davis in his objections objected to that. Costs were awarded us but Mr. Davis points out there objections to that until the first count of the complaint on that portion of the case is disposed of. Most of the costs incurred up to this time arise out of the first count rather than this part of the action, so I have in presenting the judgment omitted any reference to costs.

The Court: Very well, it looks all right.

Mr. Angland: Now as to the balance of that case, your Honor, when I wrote Mr. Davis on September 15th I inquired as to whether or not Mr. Norman Hanson had advised him that I had proposed in open court on the 6th when we were there that a Master be appointed to hear the balance of the case, and I told him you didn't make any determination pending word from him and pending opportunity to be heard on the matter. I requested him to write to you or write to me so I might convey his ideas. I haven't heard from him concerning any idea he might have about the appointment of a Master and I suppose I might pursue that further.

The Court: Very well, I think we ought to get some action on that as soon as we can. I think we ought to have a Special Master appointed and set him to work because it will take some time for him to work that out.

Mr. Angland: To assemble all the facts it will take some period of time.

The Court: Well whenever you get ready I sug-

gest you be as expeditious as possible about it.

Mr. Angland: Well I will write Mr. Davis again.

The Court: All right.

Mr. Angland: That is all I have this morning.

Certified true and correct record in above case.

/s/ SIDNEY O. SMITH,
Official Court Reporter.

[Endorsed]: Filed January 16, 1952.

In the District Court of the United States in and for the ~~District~~ of Montana, Billings Division

Civil No. 1089

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. HARTWIG, JEFF TINGLE and W. C. JENNINGS,

Defendants.

ORDER ON MOTION FOR SUMMARY JUDGMENT

This cause ~~came~~ on to be heard on plaintiff's Motion for Summary Judgment upon part of the plaintiff's claim set forth in the Amended Complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure; and the Court having considered

the pleadings in the action, the Affidavits filed by plaintiff and defendants, and having heard argument, and considered the Briefs filed by the respective parties; and the Court having ruled that plaintiff is entitled to Summary Judgment as a matter of law against the defendants A. W. Hartwig and Jeff Tingle as to plaintiff's claim for a mandatory injunction and order directing the defendants to make restitution to each of the purchasers named in Exhibit A attached to the Amended Complaint by paying and satisfying the Special Improvement levy or tax made by Yellowstone County, State of Montana, against each of the dwellings referred to in the Amended Complaint and designated therein and also in the Answers filed herein by the defendants as Rural Special Improvement District No. 73 for water mains, sewers, concrete curbs, gutters and oil mix pavement, or in the alternative, if it should be found that any of said purchasers have paid the special improvement levy or tax against a particular dwelling, then that the order direct that the purchaser be reimbursed in the amount of the tax lien paid by him, which ruling of the Court and the grounds therefor are particularly set forth in the Court's decision duly given, made, entered and filed herein on the 30th day of July, 1951; and the Court having now determined that there is no just reason for delay in the entry of a judgment as to those claims on which summary judgment has been granted.

Wherefore, by reason of the premises, it is hereby

Ordered, Adjudged, and Decreed, and pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, it is hereby expressly directed:

1. That a judgment be entered herein in favor of plaintiff, The United States of America, and for the benefit of the purchasers named below and against the defendants A. W. Hartwig and Jeff Tingle.

2. That the defendants A. W. Hartwig and Jeff Tingle herein be and they hereby are required and directed to satisfy the levy or tax made against the dwellings referred to in the Amended Complaint on file herein by paying and satisfying the assessment made by Yellowstone County, Montana, pursuant to Rural Special Improvement District No. 73, and if it is found that any of the following named persons have paid the special improvement levy as it affects the particular dwelling described below, then the defendants A. W. Hartwig and Jeff Tingle are hereby required and directed to reimburse said named purchaser for the amount expended by him in satisfying the said special improvement tax or levy. The following are the names of the purchasers and the description of the dwellings purchased by the named individual and the levy or tax laid pursuant to Rural Special Improvement District No. 73 against each tract or parcel of real estate referred to:

Name	Description of Dwelling	Special Improvement Lin and Interest
Swan C. Anderson	112 Arden, Lot 17, Block 2	$1175.49
Leonard O. Apps, et ux	125 Bruce, Lot 8, Block 2	1175.49
E. R. Bahn, et ux	121 Bruce, Lot 6, Block 2	1175.49
R. R. Bailey, et ux	116 Bruce, Lot 4, Block 3	1165.42
J. R. Derden, et ux	113 Bruce, Lot 2, Block 2	1175.49
W. A. Crutcher, et ux	127 Bruce, Lot 9, Block 2	1175.49
Alva A. Harms, et ux	111 Bruce, Lot 1, Block 2	1175.49
Roy W. Hodge, et ux	123 Bruce, Lot 7, Block 2	1175.49
Ivan F. Hutchens, et ux	116 Arden, Lot 15, Block 2	1175.49
Le Roy D. Jensen, et ux	110 Arden, Lot 18, Block 2	1175.49
Charles Kuhne, et ux	122 Arden, Lot 12, Block 2	1175.49
A. R. Marquardt, et ux	122 Bruce, Lot 7, Block 3	1156.90
R. B. McGinnis, et ux	124 Bruce, Lot 8, Block 3	1154.07
F. J. Newman, et ux	117 Bruce, Lot 4, Block 2	1175.49
Leonard W. Noyes, et ux	126 Arden, Lot 10, Block 2	1175.49
John H. Nickerson, et ux	114 Arden, Lot 16, Block 2	1175.49
N. A. Potter, et ux	114 Bruce, Lot 3, Block 3	1168.02
Merle R. Price, et ux	118 Arden, Lot 14, Block 2	1175.49
Jimmy Scott	110 Bruce, Lot 1, Block 3	1174.08
R. M. Stearns, et ux	120 Arden, Lot 13, Block 2	1175.49
Louis P. Studer, et ux	119 Bruce, Lot 5, Block 2	1175.49
John C. Wade, et ux	120 Bruce, Lot 6, Block 3	1159.75
Howard A. Walter, et ux	115 Bruce, Lot 3, Block 2	1175.49
Roy N. Watne, et ux	118 Bruce, Lot 5, Block 3	1162.60

3. That the defendants A. W. Hartwig and Jeff Tingle may make the payment hereinbefore directed to be made to Yellowstone County, Montana, or to the purchaser named as the case may be, or in the alternative, they may pay to the Registry of the Court, the said amount hereinbefore referred to which sum shall be for the use and benefit of the said Yellowstone County, Montana, or the purchasers hereinbefore named and shall be paid by

the Clerk upon proper identification or certification that payment as to each dwelling hereinbefore referred to will satisfy the special improvement levy or tax made by Yellowstone County, Montana, or if such payment has been made by the purchaser, then that such payment by the Clerk will reimburse said purchaser for the amount expended by him in satisfying the said special improvement tax or levy.

/s/ CHARLES N. PRAY,
United States District Judge.

Entered and noted in Civil Docket November 19, 1951. H. H. Walker, Clerk, by C. G. Kegel, Deputy.

[Endorsed]: Filed September 26, 1951.

[Title of District Court and Cause.]

DOCKET ENTRY

Sept. 26, 1951. Filed and entered Order on Motion for Summary Judgment; Ent. Minute Record thereof.

[Title of District Court and Cause.]

MOTION

The Defendants move the court as follows:

I.

To correct, pursuant to Rule 60 of the Rules of Civil Procedure for the District Courts of the

United States, that certain Order on Motion for Summary Judgment in the above-entitled action filed and entered under date of September 26, 1951, by striking therefrom the following language thereof:

> "And the Court having now determined that there is no just reason for delay in the entry of a judgment as to those claims on which summary judgment has been granted".

WOOD, COOKE & MOULTON
/s/ By STERLING M. WOOD,
Attorneys for Defendants.

To: Emmett C. Angland, Assistant Attorney of the United States in and for the District of Montana, and Attorney for the Plaintiff in the above-entitled action:

Please take notice that the undersigned will bring the above motion on for hearing before this Court in the Post Office Building, City of Great Falls, Montana, on the 19th day of November, 1951, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

WOOD, COOKE & MOULTON
/s/ By STERLING M. WOOD,
Attorneys for Defendants.

Acknowledgment of Service attached.

[Endorsed]: Filed November 16, 1951.

[Title of District Court and Cause.]

DOCKET ENTRY

Nov. 19, 1951. Entered Order with express determination therein of no just reason for delay in the entry of Judgment on Plaintiff's Motion for a Summary Judgment, and with direction in said order for the entry of judgment; and

Filed and Entered Judgment in favor of Plaintiff and against defendants A. W. Hartwig and Jeff Tingle for the benefit of the purchasers named in Exhibit "A" attached to the Amended Complaint, directing the said defendants to satisfy certain Special Improvement Assessments made by Yellowstone County, Montana, pursuant to Rural Special Improvement District No. 73, with alternatives in the manner of payment of the amounts specified as taxes against the dwellings referred to therein.

[Title of District Court and Cause.]

DECISION AND ORDER DENYING DEFENDANTS' MOTION

Pursuant to oral arguments and briefs of counsel, the following motion is presented to the Court by defendants for decision: "to correct, pursuant to rule 60 of the Rules of Civil Procedure for the District Courts of the United States, that certain order on Motion for Summary Judgment in the above-entitled action filed and entered under date

of September 26, 1951, by striking therefrom the following language thereof:

'and the Court having now determined that there is no just reason for delay in the entry of a Judgment as to those claims on which Summary Judgment has been granted.' " As it seems to the Court the elimination of the language above quoted from the order for Summary Judgment would not accomplish the purpose apparently intended by counsel, since the following paragraph of the order expressly directs entry of Judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, which contains the very language counsel seeks to strike from the foregoing paragraph.

The Court has considered the arguments and briefs of counsel and being duly advised, and good cause appearing therefor, is of the opinion that the order for Summary Judgment sought to be changed by the foregoing motion is now a final Judgment, and that said Motion should be overruled and such is the order of the Court herein.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed November 21, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that A. W. Hartwig and Jeff Tingle, Defendants above named, hereby appeal to the United States Court of Appeals for the

Ninth Circuit from the so-called Order on Motion for Summary Judgment entered in this action on the 19th day of November, 1951.

/s/ STERLING M. WOOD,

Of Wood, Cooke & Moulton, Attorneys for Appellants, A. W. Hartwig and Jeff Tingle.

[Endorsed]: Filed January 15, 1952.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge that we and our personal representatives and successors are bound to pay to the above-named Plaintiff the sum of Two Hundred Fifty and 00/100 ($250.00) Dollars.

The condition of this bond is that whereas the Defendants, A. W. Hartwig and Jeff Tingle, have appealed to the Court of Appeals for the Ninth Circuit by Notice of Appeal filed January 15, 1952, from the judgment of this court entered November 19, 1951, if the said Defendants shall pay all costs adjudged against them if the appeal is dismissed or the judgment is affirmed or such costs as the appellate court may award if the judgment is modified, then this bond to be void, but if the Defend-

ants fail to perform this condition, payment of the amount of this bond shall be due forthwith.

Dated January 15, 1952.

/s/ A. W. HARTWIG,
/s/ JEFF TINGLE,
Per Hartwig
Defendants, Billings, Montana.

[Seal] THE GENERAL CASUALTY COMPANY OF AMERICA, a corporation,
/s/ By M. B. BERGMAN,
Surety, Attorney-in-Fact.

Signed and acknowledged before me this 15th day of January, 1952.

[Seal] /s/ STERLING M. WOOD,
Notary Public for the State of Montana, residing at Billings, Montana. My commission expires Oct. 22, 1954.

[Endorsed]: Filed January 15, 1952.

[Title of District Court and Cause.]

STIPULATION

Whereas the Appellants and the Appellee have heretofore duly filed herein their designations, respectively, under Rule 75 of the Rules of Civil Procedure, of the Contents of the Record on Appeal to the Court of Appeals for the Ninth Circuit and now desire, and in lieu of such designation, to designate, by stipulation, the parts of the records

and proceedings herein to be included in the Record on Appeal pursuant to Rule 75(f) of the aforesaid rules;

Now therefore, it is stipulated by the Appellants and Appellee, by and through the undersigned their attorneys, that the parts of the record and proceedings in the above entitled action to be included in the Record on Appeal are hereby designated as follows, to-wit:

1. Summons issued October 8, 1948.

2. Amended Complaint filed December 16, 1949.

3. Motion to dismiss amended complaint filed January 16, 1950.

4. Decision and Order denying motion to dismiss dated October 4, 1950.

5. Answer of defendants Hartwig and Tingle filed October 31, 1950.

6. Answer of defendant Jennings filed October 31, 1950.

7. Plaintiff's motion to strike demand for jury trial and portions of respective answers, and motion for summary judgment filed December 28, 1950.

8. Affidavit of A. W. Hartwig, defendant, filed January 27, 1951.

9. Affidavit of W. C. Jennings filed January 27, 1951.

10. Affidavit of Ben S. Hill filed March 26, 1951.

11. Affidavit of H. L. White filed March 26, 1951.

12. Excerpt from defendants' brief in reply to motion for summary judgment as follows: "Since the first brief for the defendants upon these motions was filed and served the defendant W. C.

Jennings has died. As to him then the cause is thus at an end. The plaintiff's motions at bar then are before the Court in any case only as to the defendants Hartwig and Tingle". (Page 1 of Reply Brief filed April 26, 1951.)

13. Decision and Order of the Court granting motion to strike and granting motion for summary judgment filed July 30, 1951.

14. Transcript of proceedings before the Honorable Charles N. Pray on September 6, 1951.

15. Defendants' objections to proposed summary judgment filed September 12, 1951.

16. Transcript of proceedings before the Honorable Charles N. Pray on September 26, 1951.

17. Order on motion of summary judgment filed and entered in Clerk's Civil Order Book September 26, 1951.

18. Docket entry of September 26, 1951, showing filing and entering of Order on motion for summary judgment.

19. Motion of defendants filed November 16, 1951.

20. Docket entry entered November 19, 1951, with reference to order on motion for summary judgment filed September 26, 1951, and entering judgment in favor of plaintiff and against defendants A. W. Hartwig and Jeff Tingle.

21. Decision and Order denying defendants' motion filed and entered November 21, 1951.

22. Notice of Appeal by defendants A. W. Hartwig and Jeff Tingle filed January 15, 1952.

23. Bond for costs on appeal.
24. This Stipulation.

WOOD, COOKE & MOULTON,
/s/ By STERLING M. WOOD,
Attorneys for Defendants-Appellants.

DALTON PIERSON,
United States Attorney,
/s/ EMMETT C. ANGLAND,
Assistant U. S. Attorney
Attorneys for Appellee.

[Endorsed]: Filed February 6, 1952.

[Title of District Court and Cause.]

ORDER

It appearing to the Court that a Notice of Appeal has been filed in the above entitled cause, and that the Rules of the United States Court of Appeals for the Ninth Circuit permit the transmittal of the original files in a cause to the extent designated by the parties in order to minimize the expense of the litigation by the elimination of the cost of preparing records on appeal and to expedite the transmittal of records for printing,

It Is Hereby Ordered that the Clerk of this Court transmit the original files herein to the Clerk of the United States Court of Appeals for the Ninth Circuit to the extent designated by the parties to said cause, and upon the filing of the designatio

of the record on appeal and the statement of points as required by the Federal Rules of Civil Procedure.

Dated this 6th day of February, 1952.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed February 7, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers, to-wit:

Summons issued October 8, 1948.

Amended Complaint.

Motion to Dismiss Amended Complaint.

Decision and Order denying Motion to Dismiss.

Answer of Defendants, A. W. Hartwig and Jeff Tingle.

Answer of Defendant, W. C. Jennings.

Plaintiff's Motion to Strike demand for jury trial and portions of respective answers, and motion for summary judgment.

Affidavit of A. W. Hartwig, Defendant.

Affidavit of W. C. Jennings, Defendant.

Affidavit of Ben S. Hill.

Defendants' Brief in Reply on Motion for Summary Judgment, etc.

Decision and Order of the Court granting Motion to Strike and granting Motion for Summary Judgment.

Transcript of Proceedings before the Honorable Charles N. Pray on September 6, 1951.

Defendants' Objections to Proposed Summary Judgment Styled "Order on Motion for Summary Judgment".

Transcript of proceedings before the Honorable Charles N. Pray on September 26, 1951.

Order on Motion for Summary Judgment.

Docket entry of September 26, 1951, showing filing and entering of Order on Motion for Summary Judgment.

Motion of Defendants to correct Order on Motion for Summary Judgment.

Docket entry entered November 19, 1951, with reference to order on Motion for Summary Judgment filed September 26, 1951, and entering judgment in favor of plaintiff and against defendants A. W. Hartwig and Jeff Tingle.

Decision and Order denying defendants' Motion.

Notice of Appeal by defendants A. W. Hartwig and Jeff Tingle.

Bond for costs on Appeal.

Stipulation of contents of Record on Appeal.

Order to Transmit original papers to the United States Court of Appeals,

are the originals filed in Case No. 1089, United States of America, Plaintiff, vs. A. W. Hartwig, Jeff Tingle, and W. C. Jennings, Defendants, (ex-

cepting docket entries, which are copies), and stipulated by the Appellants and the Appellee to be the designation of the contents of the record on appeal in said cause.

Witness my hand and the seal of said Court at Great Falls, Montana, this 19th day of February, A. D. 1952.

[Seal] H. H. WALKER,
Clerk as aforesaid,
/s/ By ELIZABETH C. McKEE,
Deputy Clerk.

[Endorsed]: No. 13,267. United States Court of Appeals for the Ninth Circuit. A. W. Hartwig and Jeff Tingle, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed: February 22, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13,267

UNITED STATES OF AMERICA,

Appellee,

vs.

A. W. HARTWIG and JEFF TINGLE,

Appellants.

STATEMENT OF POINTS

Come now the Appellants in the above-entitled action, by and through the undersigned, their attorneys, and, in compliance with Rule 19 (6) of the above-named Court, set forth a concise statement of the points on which the Appellants intend to rely in the prosecution of their appeal, to-wit:

1. The district court erred in granting a summary judgment, because there is a substantial and genuinely disputed issue of fact drawn by the appellants' answer upon the allegations of the second count in the amended complaint, the decision of which is material, and which accordingly should be tried out.

2. The district court erred in striking out the affirmative defenses interposed by the appellants to the amended complaint, and particularly the plea of substantial performance accepted by the plaintiff which the appellants interposed.

3. The district court erred in striking out the appellants' demand for trial by jury, and in hearing

and deciding the plaintiff's claim under the said second count as a suit in equity rather than an action at common law tried to a jury.

4. The district court erred in granting equitable relief, viz., in awarding a mandatory injunction notwithstanding that the plaintiff has a plain, speedy and adequate remedy at law for the recovery of pecuniary damages.

5. The district court erred in denying the appellants their right to trial by jury of the issues drawn by their answer upon the second count in the amended complaint secured to them by the Seventh Amendment to the Constitution of the United States.

Dated at Billings, Montana, this 4th day of March, A. D., 1952.

WOOD, COOKE & MOULTON,
/s/ By STERLING M. WOOD,
Attorneys for Appellants.

Acknowledgment of Service attached.

[Endorsed]: Filed Mar. 7, 1952. Paul P. O'Brien, Clerk.

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No. 515

No. 15145

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SEP 30 1957
JOHN T. FEY, Clerk

United States
Court of Appeals
for the Ninth Circuit

A. W. HARTWIG and JEFF TINGLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Two Volumes

Volume II
(Pages 153 to 324)

Appeal from the United States District Court for the District of Montana, Billings Division

No. 15145

United States
Court of Appeals
for the Ninth Circuit

A. W. HARTWIG and JEFF TINGLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Two Volumes

Volume II
(Pages 153 to 324)

Appeal from the United States District Court for the District of Montana, Billings Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—8-22-56

NAMES AND ADDRESSES OF ATTORNEYS

STERLING M. WOOD,
328 Yellowstone Ave.,
Billings, Montana,

Attorney for Appellants.

KREST CYR,
United States District Attorney,
Butte, Montana;

DALE F. GALLES,
Assistant United States Attorney,
Billings, Montana;

FRANK M. KERR,
Assistant United States Attorney,
Butte, Montana,

Attorneys for Appellee.

In the United States District Court for the District of Montana, Billings Division

No. 1089

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W HARTWIG and JEFF TINGLE,

Defendants.

ORDER FOR REFERENCE OF APPOINTMENT OF SPECIAL MASTER

Upon hearing plaintiff's motion for an Order referring to a special master the hearing and reporting of the issues of fact pertaining to the direct overcharges and construction defects and omissions as alleged in plaintiff's Amended Complaint on file herein, and it appearing to the Court that the complicated and exceptional issues of fact require such a reference, and the Court being fully advised in the premises,

It Is Ordered and this does Order that the issues of fact hereinafter set forth be referred to William G. Baucus, Esq., of Great Falls, Montana, as special master to hear the parties and their evidence, and to report to the Court his findings of fact and his conclusions thereon, in accordance with the powers, duties and procedure set forth in Rule 53 of the Federal Rules of Civil Procedure for the United States District Courts. The matters to be

heard and determined by said special master are as follows:

(a) The amounts, if any, charged to or paid by the purchasers, and each of them, or their successors in interest, in excess of the maximum authorized sales price of $8,000.00 for each dwelling as described in Exhibit A of the Amended Complaint on file herein.

(b) The reasonable value of the "construction defects and omissions," if any, of each dwelling as described in Exhibit A of the Amended Complaint on file herein.

It Is Further Ordered that said special master shall be allowed reasonable compensation for his services to be fixed by the Court.

Dated this 18th day of November, 1954.

/s/ CHARLES N. PRAY,
United States District Judge.

[Endorsed]: Filed November 18, 1954.

Entered November 20, 1954.

[Title of District Court and Cause.]

REPORT OF SPECIAL MASTER

Comes Now, the undersigned Special Master, appointed by Order of the above-entitled Court dated November 18, 1954, and reports to the Court as follows:

I.

Introduction

Pursuant to said Order and in accordance with Rule 53 of the Federal Rules of Civil Procedure, the undersigned held his first meeting with counsel for the respective parties in Billings, Montana, on December 6, 1954. As a result of arrangements made at that time, hearing on the above-entitled matter was held in Billings, Montana, on January 17 and 18, 1955, at which hearing testimony was taken and evidence received, the transcript of the proceedings therein being submitted herewith.

A question has been raised in briefs of counsel submitted to the Special Master upon conclusion of said hearing, having to do with the scope of the report to be submitted dependent upon the meaning of the phrase "to report to the Court his findings of fact and his conclusions thereon * * *" as contained in the Order of November 18, 1954.

The matters to be heard and determined by the Special Master must of necessity involve both conclusions of fact and conclusions of law. However, a question as to the authority of the Special Master to make the latter is rendered moot by the fact that the law of the case has heretofore been established by the appointing authority, and the undersigned has reached his conclusions (whether they be of fact or of law) by applying the law as interpreted by the above-entitled Court in this case to the evidence and testimony adduced at the hearing.

II.

Findings of Fact

(a) The Special Master makes the following findings of fact as to the amounts, if any, charged to or paid by the purchasers, and each of them, or their successors in interest, in excess of the maximum authorized sales price of $8,000.00 for each dwelling as described in Exhibit A of the Amended Complaint on file herein:

1. That said sum of $8,000.00 was charged to or paid by the purchasers, and each of them, or their successors in interest.

2. That in addition thereto, the amount of the special improvement taxes, assessed against each lot as hereinafter set forth was charged to or paid by the purchasers, and each of them, or their successors in interest.

3. That the maximum authorized sales price of $8,000.00 was intended by the parties to include the special improvements for which said special improvement taxes were levied. This finding of fact is compelled by Exhibit 15, in the face of which subsequent conflict in the testimony and argument by learned counsel for the defense must fail. The representations by the defendants that street and utility improvements would be installed by them and included in the sale price and that the purchasers would not be required to pay any special assessments, as made in said Exhibit 15, are clear and

unambiguous and were not altered by other exhibits or testimony.

(b.) The Special Master makes the following findings of fact as to the reasonable value of the "construction defects and omissions," if any, of each dwelling as described in Exhibit A of the Amended Complaint on file herein:

1. That the reasonable value of the variations in construction of said dwellings is the same amount as reflected in said Exhibit A as being "construction defects and omissions."

2. That the construction of said dwellings was subject to inspection and was inspected by representatives of the Federal Housing Administration, which representatives indicated both verbally and in writing that the variations were not such as to cause non-compliance with the plans and specifications.

3. That it is the opinion of the Special Master that the approval of the variations by the representatives of the Federal Housing Administration was not within the scope of their authority. (See decision of the above-entitled Court dated July 30, 1951.)

III.

Conclusions

Wherefore, the Special Master after fully considering the evidence and the objections to the admission thereof and being fully advised in the premises, concludes as follows:

(a) The amount charged to or paid by the purchasers, and each of them, or their successors in interest, in excess of the maximum authorized sales price of $8,000.00 for each dwelling as described in Exhibit A of the Amended Complaint on file herein, are as follows:

Name of Purchaser	Lot	Block	Amount
Swan C. Anderson	17	2	$1,095.97
Leonard O. Apps	8	2	1,095.97
E. R. Bahn	6	2	1,095.96
R. R. Bailey	4	3	1,086.57
J. R. Derden	2	2	1,045.59
W. A. Crutcher	9	2	1,095.96
Alva A. Harms	1	2	1,095.96
Roy W. Hodge	7	2	1,095.96
Ivan F. Hutchens	15	2	1,095.98
LeRoy D. Jensen	18	2	1,095.97
Charles Kuhne	12	2	1,095.96
A. R. Marquardt	7	3	1,141.28
R. B. McGinnis	8	3	1,075.99
F. J. Newman	4	2	1,064.14
Leonard W. Noyes	10	2	1,080.09
John H. Nickerson	16	2	1,095.96
N. A. Potter	3	3	1,168.03
Merle R. Price	14	2	1,064.14
Jimmie Scott	1	3	1,094.64
R. M. Stearns	13	2	1,095.97
Louis P. Studer	5	2	1,138.40
John C. Wade	6	3	1,065.58
Howard A. Walter	3	2	1,095.97
Roy N. Watne	5	3	1,110.16

(b) The reasonable value of the "construction defects and omissions" of each dwelling as described in Exhibit A of the Amended Complaint on file herein, are as follows:

Name of Purchaser	Lot	Block	Amount
Swan C. Anderson	17	2	$1,010.33
Leonard O. Apps	8	2	1,188.75
E. R. Bahn	6	2	1,218.75
R. R. Bailey	4	3	1,263.75
J. R. Derden	2	2	1,238.75
W. A. Crutcher	9	2	1,208.75
Alva A. Harms	1	2	1,214.11
Roy W. Hodge	7	2	1,197.95
Ivan F. Hutchens	15	2	1,164.05
LeRoy D. Jensen	18	2	1,268.63
Charles Kuhne	12	2	1,219.95
A. R. Marquardt	7	3	1,218.75
R. B. McGinnis	8	3	1,253.00
F. J. Newman	4	2	1,221.00
Leonard W. Noyes	10	2	1,171.31
John H. Nickerson	16	2	1,262.25
N. A. Potter	3	3	1,214.11
Merle R. Price	14	2	1,207.95
Jimmie Scott	1	3	1,249.80
R. M. Stearns	13	2	1,219.95
Louis P. Studer	5	2	1,253.00
John C. Wade	6	3	1,233.00
Howard A. Walter	3	2	1,207.95
Roy N. Watne	5	3	1,202.75

Respectfully submitted this 7th day of March, 1955.

/s/ WILLIAM G. BAUCUS,
Special Master.

[Endorsed]: Filed March 7, 1955.

[Title of District Court and Cause.]

OBJECTIONS TO MASTER'S REPORT

Come now the defendants in the above-entitled and numbered cause, by and through their attor-

neys of record, and respectfully represent that, in the respects hereinafter specified, the Master has erred, to the prejudice of the said defendants, in his report filed heretofore in said cause, to wit:

I.

The Master erred in his report in his disregard (a) of the facts established of record, and (b) of the applicable principles of law, all as presented in the "Brief of Defendants on Hearing Before Master;" and in support of the objections in this paragraph hereof to the Master's report, copy of the said brief is hereto attached, marked Exhibit A, and hereof made a part;

II.

The Master erred in his report in failing to make the findings of fact heretofore requested by the defendants; and hereto attached, marked Exhibit B, and hereof made a part, is a true and correct copy of the said findings so requested of the Master by the defendants in letter from defendants' counsel to the said Master, bearing date of February 28, 1955;

III.

The Master erred in his report in the making of his "findings of fact" and "conclusions" in that the said findings of fact and conclusions are contrary to the evidence in the record and are not in accordance therewith, and, furthermore, do violence to and disregard the applicable and established principles

of law presented in Exhibit A, hereto attached and hereof made a part;

IV.

The Master erred in his report in disregarding the objection (Tr. 3) made by defendants' counsel at the outset of the hearing before the Master which objection is in the words as follows, to wit: "I want the record to show at this time that we object to the introduction of any evidence before the Master upon the ground that the amended complaint fails to state a claim against the defendants, either jointly or severally, in either or in both of the counts involved, upon which relief can be granted." This record objection is predicated particularly upon the grounds specified in subdivision III of the brief, Exhibit A, hereto attached and hereof made a part, wherein controlling authorities are cited that sustain the objection so made;

V.

The Master erred in his report in paragraph 3 of his "findings of fact," and in the following statement made by him therein, to wit: "This finding of fact is compelled by Exhibit 15, in the face of which subsequent conflict in the testimony and argument by learned counsel for the defense must fail. The representations by the defendants that street and utilities improvements would be installed by them and included in the sale price and that the purchasers would not be required to pay any special assessments, as made in said Exhibit 15, are clear and unambiguous and were not altered by other

exhibits or testimony." The Master erred in this connection in that said Exhibit 15, photostatic copy whereof will be attached to these objections for the convenience of the Court, was made and submitted, as set forth specifically therein, upon May 18, 1946, which was prior to the enactment into law, upon May 22, 1946, of the Veterans' Emergency Housing Act of 1946, upon which said Act this action is predicated, and accordingly, Exhibit 15 was not made pursuant to or in furtherance of the said Act and is without legal effect in said action; and, in further support of the objections in this paragraph hereof set forth, the attention of the Court is called to the record before the Master (Tr. 19), where objection is made by defendants to the offer of Exhibit 15 in evidence, and this objection is predicated upon the ground that the said Exhibit was and is irrelevant for any purpose;

VI.

The Master further erred in his report, in paragraph 3 of his "findings of fact," in disregarding: (a) The plain language of the Veterans' Emergency Housing Act of 1946, which statute, in Section 3(b) thereof defines "improvements" for the purposes of the law as "improvements sold with the housing accommodations"; (b) The fact of record that the defendants have sold no improvements in their sales of housing accommodations; and (c) The fact that there is no evidence in the record that the defendants have made any express or other representations that the maximum sale price estab-

lished included or would include any special improvements of any kind;

VII.

The Master erred in his report in stating, as a finding, that it is his opinion that the approval of variations in construction by representatives of the Federal Housing Administration was not within the scope of their authority, and the Master so erred in that under paragraph (5) (e), of Priorities Regulation No. 33, it is provided that a builder who uses the rating therein provided for to get materials for housing accommodations must construct them in accordance with the description given in the application except where he has obtained from the Federal Housing Administration approval for a change from the application; and in further support of the objection to the Master's report in this paragraph set forth, the record before the Master is submitted to establish, as it does, that any variations in construction work here involved, were neither defects nor ommissions, but were changes in construction that were approved, pursuant to law, by the FHA by the various Compliance Reports involved and placed in evidence.

Wherefore, Defendants respectfully pray that all and singular the foregoing objections to the report of the Master may be by the Court sustained, that the findings to which the defendants have objected herein may be set aside and disapproved, that the report of the Master be not accepted or adopted in that it is contrary to both the law and the facts,

and that defendants may have such additional relief as may be equitable, right and proper in the premises.

Respectfully submitted this 23rd day of March, A.D. 1955.

WOOD, COOKE & MOULTON,

By /s/ STERLING M. WOOD,
Attorneys for the
Defendants.

Service of copy acknowledged.

EXHIBIT A

(Copy)

In the United States District Court for the District of Montana, Billings Division

Civil Case No. 1089

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. HARTWIG and JEFF TINGLE,

Defendants.

BRIEF OF DEFENDANTS ON HEARING BEFORE MASTER

The United States of America, as plaintiff in the above-entitled action, has filed, through the United

States Attorney's office, a memorandum argument. This brief is submitted in reply thereto by the defendants through their counsel. As the Master will recall, the arrangement outlined in the record of testimony taken before him on January 17th and 18th, 1955, provides for written argument on behalf of the parties, predicated upon the matter submitted to the Master; and this brief is being submitted within the time allowed therefor.

Preliminary Matter

It is important that certain settled matters—settled by the record—be clearly understood, and, hence, be outlined initially before the argument herein on the record is submitted by the defendants as a basis for ultimate action on the part of the Master.

First: The defendants flatly dispute that there is any liability upon their part under either of the counts pleaded in the amended complaint. In other words, the defendants have denied the allegations of the amended complaint that purport, prima facie, so far as the pleaded language is concerned in these two counts, to establish a liability upon the part of the defendants. It seems unnecessary to us to detail the pleadings in this connection. The Master will see for himself, by an examination of the amended complaint and the answer of defendants, A. W. Hartwig and Jeff Tingle, to that amended complaint, that, by virtue of the denials made in that answer, the government is put completely to its

proof to establish facts, if they exist, that create the claimed liability upon the part of the defendants.

Second: As the Master will remember, the various stipulations dictated to the record were made only as a matter of accommodation and to shorten the period of the trial before the Master. In no sense of the word did the defendants admit the relevancy of facts dictated to the record for the government by stipulation, or concede that the facts were proper. But, by the stipulations, the government, particularly, was relieved of what otherwise would have been its obligation in the premises, namely, to introduce original records, witnesses in person, and take days of time in the introduction of testimony, both record and oral, that counsel for the defendants was willing to concede the government would have available if given the time to produce the same. The stipulations for the government were acts of courtesy designed to shorten the hearing and to lessen the time the Master would have to spend on the case. The right of the plaintiff to use the testimony, put in by stipulation, was questioned by objections of record, by which we mean to say it was questioned as to its effectiveness to establish liability on the part of the defendants. In this connection the Master will please note that, at the very outset of the hearing, (Tr. 3) the defendants objected to the introduction of any evidence before the Master, and upon the ground that the amended complaint fails to state a claim against the defend-

ants, either jointly or severally, in either or both of the counts involved, upon which relief can be granted. That objection was allowed by the Master as a general objection to all evidence in the case. Furthermore, upon pages 3 and 4 of the record, the statement is made that counsel had the understanding, "to save much formal proof in the shape of original documents that might have to be brought over from the courthouse and elsewhere," etc., that the government may read into the record what the figures involved are, and that defendants would make no objection to their competency because they were put into the record in that shape. It was further agreed and stipulated in this connection that Exhibit A, attached to the amended complaint, is conceded to be correct as to the names of the purchasers, the lots involved, the dates of sale, and the maximum sales price. But, objection was made (Tr. 4) to any evidence with respect to the so-called special improvement liens, and interest, upon the ground that it was irrelevant at the particular stage when this matter was dictated to the record, no proper or sufficient foundation having been laid for the introduction of any such evidence. The effect of the stipulation of counsel, so far as the government is concerned, is, that none of the evidence stipulated is really relevant in that no basic liability has been established thereby, or otherwise, but that defendants do not object to the kind of evidence—the stipulation—that the government has used to put its evidence into the record. Thus, the government has established the data set forth in Exhibit

A, annexed to the amended complaint, that relate to amounts of special improvement liens, and interest, with the names of purchasers, property involved and dates of sale of the property.

It should be noted further, in this connection, that another objection was made to the record by defendants' counsel, which was a bit garbled initially by the court reporter but has been corrected to read as follows, to wit: "That the matter covered by the stipulation is incompetent, in any event, in view of the repeal by the Housing and Rent Act of 1947 of the Veterans' Emergency Housing Act of 1946, and by the repeal clause in the first mentioned act."

Third: The attention of the Master is also directed to the stipulation presented by defendants' counsel, and read to the record (Tr. 34, et seq.), which puts into the record much evidence, and to which no objection whatever was made by counsel for the government.

Fourth: The order for reference, and under which the Master acted, provides (a) that the Master shall report to the court his findings of fact and his conclusions thereon, (b) that the Master shall hear and determine the amounts, if any, charged to or paid by the purchasers, and each of them, or their successors in interest, in excess of the maximum authorized sales price of $8,000 for each dwelling, as described in Exhibit A of the amended complaint, and (c) that the Master shall determine

also the reasonable value of the construction defects and omissions, if any, of each dwelling as described in Exhibit A to the amended complaint. In order to comply with this order, the obligation is upon the Master, under the plain language of the order, to settle the law question as to whether the amounts, if any, charged to or paid by the purchasers were in excess of the maximum authorized sale price of $8,000 for each dwelling, and also to settle the further law question as to whether there are or were construction defects and omissions with respect to the dwellings involved. The Master cannot determine whether there are defects and omissions, for instance, in construction, without first deciding what the obligation of the defendants was in this connection under the record in this case. Neither can the Master determine whether the maximum sales price of $8,000 has been exceeded until he determines, as a matter of law, whether or not there was any obligation upon the part of the defendants, under the record in this case, to take care of the special assessments involved. Furthermore, on top of both of these law questions, there is the one extremely serious law question, as to whether, under any view of the record in this case, there is a liability, as a matter of law, on the part of these defendants under the allegations of the amended complaint.

Argument

I.

The Defendants Are Not Liable for the Special Assessments.

In the first place, under this subdivision of the argument herein, it is important to consider Priorities Regulation 33, which is quoted, in part, upon page 5, of plaintiff's memorandum to the Master. That regulation, at the outset thereof, reads as follows, to wit:

> "This regulation sets up the Reconversion Housing Program of the Civilian Production Administration. It is designed to assist private builders, educational institutions and others to build moderate cost housing accommodations to which veterans of World War II will be given preference, by giving an HH preference rating for certain building materials for the construction. The regulation describes the method of applying for the HH rating, the circumstances under which the rating will be assigned, the materials for which it will be given and the condition imposed on the builder and succeeding owners in selling or renting the accommodations as long as this regulation is in force."

It is particularly worthy of note, in this argument, that the regulation specifically refers to housing accommodations. Furthermore, the whole purport of the Regulation, without going into further details (we assume this Regulation is available to

the Master) is that builders, under that Regulation, can get materials for the construction of accommodations. In other words, the builder is to build and to get the material for those building activities. Not a word is written into this Regulation with respect to matters that are handled, in every state of the union, by city and county authorities, such as the paving of streets, etc.

Thus, under settled rules of statutory construction, the following language of Priorities Regulation 33, upon which the government is standing in the case at bar, does not mean, and cannot be distorted to mean what the government contends herein, to wit:

> "A builder must not sell a one-family dwelling built or converted under the Reconversion Housing Program, including the land and all improvements (including garage if provided), for more than the maximum sales price specified in the application," etc.

Neither directly nor by implication does the plain language of this quoted clause obligate a builder to take care of special assessments levied by public authorities against the land involved.

Furthermore, the word "improvement" is defined in Black's Law Dictionary, 3rd Edition, as follows, to wit:

> "A valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs

or replacement of waste, costing labor or capital, and intended to enhance its value, beauty or utility, or to adopt it to new or further purposes." Citing many cases.

Then, further, the author, in Black's Law Dictionary, 3rd Edition, differentiates between the word "improvement," as defined, supra, and "local improvement." With respect to "local improvement" the author says:

> "By common usage, especially as evidenced by the practice of courts and text-writers, the term 'local improvements' is employed as signifying improvements made in the particular locality, by which the real property adjoining or near such locality is specially benefited, such as the improvement of highways, grading, paving," etc. Citing many cases.

Standing on these definitions alone, the word "improvements," in the aforesaid Priorities Regulation, does not include the items of special assessments for local improvements involved in suit.

And in Lewis Sutherland Statutory Construction, 2nd Ed., Para. 390, the author says:

> "As a general rule the words of a statute are to be taken in their ordinary and popular sense, unless it plainly appears from the context or otherwise that they were used in a different sense."

Furthermore, in the same work on Statutory Construction, Para. 422, the author says:

"When there are general words following particular and specific words, the former must be confined to things of the same kind. This is known as the rule or doctrine of ejusdem generis. Some judicial statements of this doctrine are here given. 'When general words follow an enumeration of particular things, such words must be held to include only such things or objects as are of the same kind as those specifically enumerated.' 'This rule is, that where words of a particular description in a statute are followed by general words that are not so specific and limited, unless there be a clear manifestation of a contrary purpose, the general words are to be construed as applicable to persons or things or cases of like kind to those designated by the particular words.' 'It is a principle of statutory construction everywhere recognized and acted upon, not only with respect to penal statutes but to those affecting only civil rights and duties, that where words particularly designating specific acts or things are followed by and associated with words of general import, comprehensively designating acts or things, the latter are generally to be regarded as comprehending only matters of the same kind or class as those particularly stated. They are to be deemed to have been used, not in the broad sense which they might bear if

standing alone, but as related to the words of more definite and particular meaning with which they are associated.' "

To all intents and purposes the Priorities Regulation here involved is a statute and must be treated as such for the purposes of construction.

Thus, standing upon the foregoing authorities alone, the word "improvements" in the Priorities Regulation above quoted has reference to things built by the builder (like houses and garages) and nothing else, which is another way of saying that by the word "improvements" in the said Regulation is meant and intended structures built with material for which the builder gets a rating.

But it is also a settled rule of statutory construction, as set forth in Lewis Sutherland on Statutory Construction, 2nd Ed., Para. 368, as follows, to wit:

"The practical inquiry is usually what a particular provision, clause or word means. To answer it one must proceed as he would with any other composition—construe it with reference to the leading idea or purpose of the whole instrument. A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently each part or section should be construed in connection with every other part or section and so as to produce a harmonious whole. It is not proper to confine the attention to the one section to be construed. 'It is always an unsafe way of con-

> struing a statute or contract to divide it by a process of etymological dissection, into separate words, and then apply to each, thus separated from its context, some particular definition given by lexicographers, and then reconstruct the instrument upon the basis of these definitions. An instrument must always be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascertained from the context, the nature of the subject treated of and the purpose or intention of the parties who executed the contract, or of the body which enacted or framed the statute or constitution."

Here then we have, to all intents and purposes, a statute, to wit: Priorities Regulation 33, relating exclusively to building activities of accommodations for veterans, to be constructed by contractors and builders who have a priority for materials for such construction work. Thus, construing the Regulation as a whole, as must be done under the law, the word "improvement," here involved, necessarily mean improvements that are constructed with material for which a builder is given a rating, and it cannot be construed otherwise without doing violence to the Regulation and to the rules of statutory construction, supra. This is simply another way of saying that there is no basis whatever in the law for arguing or contending that there is anything in Priorities Regulation 33, as applied to the case at bar, that obligates the defendants, as contractors and build-

ers, to take care of the special assessments that have been levied heretofore against the properties involved herein.

It cannot be argued legitimately that the mere verbal promises of the defendants here, or one of them, to take care of the special assessments on the properties involved created any legal obligation in this connection that the government or anybody else can enforce. At best, the evidence in this connection in the record is of pure conversation on the subject, and nothing more. But the fact must be reckoned with that the truth of the statements of the witnesses for the government in this connection is repudiated by Mr. Hartwig. Furthermore, the testimony of the various persons for the government is completely repudiated by what they did later. The Master will remember that, in every instance, when the lands involved were sold by Messrs. Hartwig and Tingle, they were conveyed through dealings between the Security Trust & Savings Bank, of Billings, Montana, and the purchasers, that the purchasers accepted straight warranty deeds, (the consideration therefor being the maximum sale price, in each sale, of $8,000), from Messrs. Hartwig & Tingle, and their wives, which deeds bore dates as of a time prior to the date in the fall of 1947 when the liens for the special assessments involved became such upon the lots in Calhoun Lane Subdivision. Thus, as the Master knows as a matter of common experience (and each grantee is charged with like knowledge), the warranty deeds given to the purchasers, as grantees, have the legal effect of

making the said grantees liable for assessments that attached, as liens, to the lots subsequent to the dates of the warranty deeds; and all of the special assessment liens did so attach subsequent to the execution and delivery of the deeds, and in the fall of 1947.

Therefore, there is nothing whatsoever in the record herein, or in the law, that gives the government, as plaintiff herein, or the property owners in Calhoun Lane Subdivision, any right whatsoever to collect from the defendants the special assessments levied upon the lands in Calhoun Lane Subdivision. The Priorities Regulation is wholly without force or effect in this connection; and there is nothing else in the record upon which the government can stand to establish the claimed liability of the defendants in this connection.

II.

There Are No "Defects or Omissions," and the FHA Has So Certified.

The contention under this subdivision of the argument is established on the record herein by the Compliance Inspection Report of the FHA in which it is certified by FHA officials as follows: "Building improvements acceptably completed." That inspection report is signed by Mr. H. A. Viken (as we read the man's signature), Construction Examiner, and is dated October 23, 1947. It further bears the certificate of L. O. Bradford of the FHA, and its acting chief architect, and the certificate of S. L. Berg, Chief Underwriter of the FHA, the latter

certifying that there has been compliance, and firm commitment, and that closing papers may be submitted. To be specific, the Compliance Inspection Report referred to is Exhibit No. 20 (Tr. 36).

Apart from the Compliance Inspection Report mentioned, attention is also invited to Para. (e), of Priorities Regulation 33, which reads as follows, to wit:

> "Construction of the Project. A builder who uses the HH rating to get materials for housing accommodations must construct them in accordance with the descriptions given in the application except where he has obtained from the Federal Housing Administration approval for a change from the application."

Thus, apart from the finality of the Compliance Inspection Report, above mentioned, that Report also operates, by its express language, as approval by the FHA of any changes from the description given in the application.

Incidentally, the testimony of Mr. Tingle is noteworthy in this connection. Without referring to it specifically, by quotation, Mr. Tingle, who is experienced in construction work, said, in substance, that the so-called "defects and omissions," that have been referred to, are really substitutions that were necessary and that were made in the progress of the work with the knowledge and approval of the FHA and its inspectors. He said specifically that he did not omit anything in the construction

of the houses without the consent and approval of the FHA inspectors, and that there were not defects, as such, in the work. Then, too, he explains why it became necessary to make some substitutions and changes in the original plans and specifications. The explanation is that, in substance, the year 1946 was one of the most difficult times for construction, that materials of all descriptions were exceedingly difficult to get hold of, especially for 27 houses at one time rather than just merely one, and that not only were materials difficult to obtain, but prices were constantly going up. He says, too, that even though Messrs. Hartwig & Tingle had a priority right to secure materials for the houses, it wasn't the highest priority right and that there were two or three higher ratings that were in existence at the time, and the ratings Messrs. Hartwig & Tingle had only entitled them to purchase the material involved that could be located, to say nothing of finding a seller who would sell the material at the priority rating that Messrs. Hartwig & Tingle had. In conclusion, Mr. Tingle says it was because of these conditions that certain changes were made, and only changes that were made necessary by these conditions. Again Mr. Tingle says that, in the progress of the work, while these changes were being made, which the government refers to as "defects and omissions," the changes were approved by all of the inspectors and were ultimately approved in the final Compliance Inspection Report. Mr. Tingle expressly repudiates (Tr. 67) that there were either construction defects or omissions in the

work which Messrs. Hartwig and Tingle completed under the FHA arrangement and approval.

Apart from the argument, supra, in this subdivision hereof, in the case of Re Opinion of the Justices—a decision of the New Hampshire Supreme Court, reported in 179 Atl. 344, the Court says:

> "A valid administrative judgment has the same force of obligation and finality as a judicial one."

As the Court points out in that case, a ruling of this sort is required to produce "an efficient and effective administrative enforcement of the public interest."

Attention is also called to the controlling case of United States vs. Kaufman, 24 L. Ed. 792, where a ruling was made by a Commissioner of Internal Revenue, and the Supreme Court of the United States had the following to say:

> "It is now insisted that the finding of an allowance by the commissioner is not enough, and that the court should have gone behind the allowance and found the facts in respect to the original claim. Such, we think, is not the law. To say the least, the allowance of a claim under this statute is equivalent to an account stated between private parties, which is good until impeached for fraud or mistake. It is not the allowance of an ordinary claim against the Government, by an ordinary accounting officer,

but the adjudication by the first tribunal to which the matter must by law be submitted. Until so submitted, and until so adjudicated, there is not even a prima facie liability of the Government; but when submitted and when allowed upon the adjudication, the liability is complete until in some appropriate form it is impeached. When, therefore, the court found the adjudication against the Government, without impeachment, the liability to pay was established. We do not decide that in the Court of Claims the adjudication of the commissioner may not be impeached, but we do decide that, until impeached, it is binding, and that the affirmative of the impeachment is upon the Government."

Here, therefore, the government is bound by the rulings made by the FHA officials in the aforesaid Compliance Inspection Report (Exhibit 20). In other words, Exhibit 20 is the precise equivalent of a judgment in an ordinary action at law. Until that judgment is set aside and impeached, by proceedings proper in the premises, it must stand and be and remain final and conclusive. Upon the last mentioned grounds alone, therefore, without reference to the other points presented herein, the defendants are not liable for the so-called "defects and omissions."

And the fact may not be overlooked or disregarded that, acting upon the strength of the Compliance Inspection Report above mentioned, and in

October, 1947, the Security Trust & Savings Bank, through which bank all transactions with the property owners in Calhoun Lane Subdivision were carried on, released, on the strength of the Compliance Inspection Report, the moneys borrowed by the property owners, as mortgagors, from the bank. Certainly under these conditions there is no equity in the claim which the government now makes in this action; and yet this is a suit in equity in which the government pretends to stand upon equitable claims in a court of equity.

For all of the reason advanced under this subdivision of the argument, it is clear that not only were there no "defects and omissions," so called, but that, in any event, the government is not entitled to recover anything in connection with the claims it makes in this connection.

III.

In Any Event, the Amended Complaint Herein Does Not State a Cause of Action in Either of the Counts Pleaded.

Upon June 30th, 1947, the Veterans' Emergency Housing Act of 1946, upon which, primarily, this action is based, was repealed by the Housing and Rent Act of 1947. The repeal clause of the 1947 Act repeals the various sections of the 1946 Act involved, and then reads as follows. (We quote the balance of the repeal clause in this connection):

> "Provided, that any allocations made or committed, or priorities granted for the delivery,

of any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of the enactment of this Act, with respect to veterans of World War II, their families, and others, shall remain in full force and effect."

Thus, we cite as controlling here the case of Wilmington Trust Co. vs. United States, 28 F. (2d) 205 and 208, where the Court applies a Federal statute and also a controlling decision by the Supreme Court of the United States:

"Section 13 of the Revised Statutes is also relied upon to show that the liability for the tax was not destroyed by the repeal of the statute. This section provides:

" 'The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.' * * * 1 U.S.C.A. Sec. 29.

" 'Of this statute the court, in Great Northern Railroad Co. v. United States, 208 U. S. 452, 28 S. Ct. 313, 52 L. Ed. 567, said: As it 'has only the force of a statute, its provision cannot justify a disregard of the will of Congress

as manifested, either expressly or by necessary implication, in a subsequent enactment.' As the estate tax provisions of the Revenue Act of 1918 were expressly repealed, with specified exceptions, it must be assumed that the exceptions specified constituted a denial of others. To enlarge the exceptions by adding the provisions Section 13 of the Revised Statutes thereto, or, more accurately stated, to add to the saving clause of the repealing statute the provisions of R. S. Sec. 13, which, as I understand it, is in implied, if not direct, conflict with the first sentence of the saving clause of the repealing act, would, I think, be plain disregard of the will of Congress as manifested in the repealing act. Fletcher v. Peck, 6 Cranch, 125, 3 L. Ed. 162."

Thus, on and after June 30th, 1947, the Veterans' Emergency Housing Act of 1946, upon which the Government relies in this case, ceased to exist except only to the extent of the proviso in the repeal act above mentioned; and that proviso does not keep effective, either directly or indirectly, any such right of action as the government claims here.

Attention is also called to the case of Sedivy v. Superior Home Builders, decided by the Court of Appeals for the Seventh Circuit, and reported in 188 F. (2d) 729. While in the Sedivy case the point here involved and presented was not considered specifically, it was indirectly. The Court has made clear its thinking, as we view it, which is that the Veterans' Emergency Housing Act of 1946 was so re-

pealed, by the 1947 Act, as to leave no right for the recovery of damages or overcharges vested in anyone. The following is quoted from the decision of the Court in the Sedivy case:

> "We assume that 'by this Act' plaintiffs refer to the Act of 1947, which became effective June 30, 1947, and by its terms repealed the 1946 Act as of that date. Admittedly, the 1947 Act contained no maximum price at which housing accommodations could be sold and, therefore, no right on behalf of a purchaser to sue for an overcharge. As we understand, plaintiffs do not contend otherwise but assert that the right created by the 1946 Act survived without any limitation period during which suit must be brought. In this connection, it is also argued that Priorities Regulation 33 remained in full force and effect until December 31, 1947.
>
> "We think the contention must be rejected. The Act of 1947, Title 50, U.S.C.A. Appendix, Sec. 1881, et seq., provides: 'Sections 1, 2(b) through 9, and Sections 11 and 12, of Public Law 388, Seventy-ninth Congress (Sections 1821, 1833 (b-d), 1823-1829, 1831 and 1832 of this Appendix), are hereby repealed * * *.' Obviously, this repeal language includes Sec. 7(d) (heretofore quoted) of the 1946 Act. However, plaintiffs rely upon a proviso which follows the repealing provision and which states 'That any

allocations made or committed, or priorities granted for the delivery of any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of enactment of this Act (June 30, 1947), * * * shall remain in full force and effect.' It plainly appears that this proviso relates solely to allocation and priorities made and granted while the 1946 Act was in effect, and that it was not directed at or intended to retain in force the maximum selling price contained in the repealed Act. That provision, as shown, was expressly repealed. It is true, as plaintiffs state, that the 1947 Act contains no limitation period, but that fact militates against plaintiffs' contention. Certainly there was no occasion to fix a limitation period on the exercise of a right which had been repealed. Plaintiffs' contention leads to the incongruous result that if the 1946 Act were still in effect, the limitation period which it contained would constitute a barrier to the instant suits but that such suits may be maintained under the 1947 Act because the latter contains no limitation period. Evidently Congress by the 1947 Act intended to restrict rather than expand the rights conferred by the 1946 Act."

Furthermore, it is stressed that this action was brought upon October 12, 1948, and that it was brought by the United States of America as plain-

tiff and not by any property owner or by the Housing Expediter.

Next it should be noted that the Housing and Rent Act of 1947 protected any allocation made or committed or priorities granted for building materials to veterans of World War II or their families under the Veterans' Emergency Housing Act. In other words, this protection was continued in effect in the Housing and Rent Act of 1947, to honor any such commitments as aforesaid as might still exist. Then, having repealed the Veterans' Emergency Housing Act of 1946 by the Housing and Rent Act of 1947, Congress addressed itself specifically to the problem of veterans housing, in the said Housing and Rent Act of 1947. Thus, in paragraph IV (a) (1) thereof it is provided that no single family dwelling, the construction of which is completed after the date of the enactment of the Act and prior to March 1st, 1948, shall be sold or offered for sale prior to the expiration of 30 days after construction is completed for occupancy by persons other than veterans of World War II or their families. It is further provided in the 1947 law last mentioned that no such dwelling house shall be sold or offered for sale to any person at a price less than the price for which it is offered to veterans or their families.

If Congress had intended to keep in force any maximum selling prices, which had theretofore been imposed under Priorities Regulation 33, it would have been natural to express such intent in the pro-

viso to paragraph I (a) of the Housing and Rent Act of 1947, which repealed the Veterans' Emergency Housing Act of 1946 (the statutory basis for Priorities Regulation 33). The repeal of the Veterans' Emergency Housing Act of 1946, by the 1947 law mentioned, covered practically all of the sections of the Veterans' Emergency Housing Act of 1946 and did so specifically.

The Housing and Rent Act of June 30, 1947, completely changed the policy of Congress as expressed previously in the Veterans' Emergency Act of 1946; and this circumstance has not been t ken into consideration in any of the decisions by the courts that have upheld action by the Government, as distinguished from a property owner or the Housing Expediter, subsequent to the enactment of the Housing and Rent Act of 1947.

In United States vs. See, decided by the United States Court of Appeals for the Ninth Circuit, and reported in 194 Fed. (2d) 100, the Court relies upon Creedon vs. Randolph decided by the Fifth Circuit and reported in 165 Fed. (2d) 918, and other similar cases. In this Creedon case the Court of Appeals for the Fifth Circuit relies in large part upon Porter vs. Warner Holding Company decided by the Supreme Court of the United States and reported in 90 L. Ed. 1332. It is pointed out, to paraphrase the decision in 90 L. Ed. to some extent, that, in framing remedies, courts must act primarily to effectuate the policy of the law and to protect the public interest, while giving necessary

respect to the private interests involved. Then, (quoting) the United States Supreme Court says:

> "The inherent equitable jurisdiction which is thus called into play, clearly authorizes the Court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress."

It is pertinent to note what the Court had to say in Woods vs. Richman, et al., decided by the Court of Appeals for the Ninth Circuit, and reported in 174 Fed. (2d) 614 with respect to an entirely different set of statutes than is involved here. The Court had the following to say:

> "Had the Congressional policy in respect to rent control lapsed with the expiration on June 30th, 1947, of the Emergency Price Control Act, we would assume that an order designed primarily to vindicate the defunct policy would no longer be appropriate in equity."

In other words, when the policy of the Veterans' Emergency Housing Act was changed by the adoption by Congress of the June 30th, 1947, law, it then became no longer possible, under the law, for the Government of the United States to proceed in equity to enforce the defunct policy of the Veterans' Emergency Housing Act of 1946. This is another way of saying that the amended complaint in the pending action does not state a cause of action in either of the counts involved.

It is pertinent also to refer to a case decided January 18, 1954, by the Supreme Court of the United States, being the case of United States of America vs. Harold T. Lindsay, et al., and reported in the advance sheets of February 1st, 1954. In that case the Court had occasion to make the following statement:

> "Congress has unquestioned power to bar recovery on Government claims if it sees fit."

Another decision of consequence in this connection is that of United States of America vs. Fortier, reported in 96 L. Ed. page 179, et seq. There the Court had the following to say about the law herein involved:

> "The 1946 Act contained detailed authorization for price restrictions on houses and for priorities on building materials. When that Act was repealed in 1947, Congress provided for Veterans' preference in the sale and rental of housing and for rent ceilings on certain accommodations constructed with the assistance of priorities secured under the 1946 Act. Congress addressed itself (meaning in the 1947 law) to the problem of Veterans' housing, but refrained from imposing any price restrictions on the sale of houses."

In other words, the Supreme Court points out decisively the change in policy brought about by the repeal of the Veterans' Emergency Housing Act of 1946 by the 1947 law.

Furthermore, when coming into a court of equity, as the government has done here, it must show an equity in its favor. (See U. S. vs. Fletcher vs. Savings and Trust Company (Ind.) 151, N. E. 420). But there is no equity in the government's stand in the suit at bar, based, as the suit is, upon a policy of Congress that was completely changed, and the government's right in the premises repealed, long before this so-called equitable action was brought.

To summarize, under this subdivision of the argument herein, the amended complaint in this action does not state a cause of action, in either of its counts, against the defendants, because of the repeal, by the 1947 Act, of the 1946 Act on which this action is based, such repeal being made with the reservation of some rights but not with a reservation of the right to prosecute this action which the government has brought. Then, too, the policy of Congress has been completely changed as a result of the aforesaid repeal of the 1946 Act, and this policy was changed upon June 30, 1947, and long before this action was brought in the fall of 1948. This repeal of the statute and of its policy left the Government without any right to bring this equitable action in the Fall of 1948, predicated, as it is, upon the theory that a then existing policy of Congress was being enforced.

Then, too, as incidental, the fact should not be overlooked that, under the authorities cited, supra, or at least one of the authorities, it is clear that not only was the Veterans' Emergency Housing Act of 1946 repealed in June, 1947, but there was

necessarily repealed at the same time Priorities Regulation 33 which had its basis solely and only in the Veterans' Emergency Housing Act of 1946. It should be noted in this connection that the amended complaint herein is based specifically upon the Veterans' Emergency Housing Act of 1946 and upon Priorities Regulation 33, and this has been done in the face of the fact that the said Act and the Regulation had no legal existence when the suit was brought, and that no right to proceed under either was reserved in the repeal effected by the 1947 Act.

Therefore, we say again that there is no basis, in law or in equity, for the institution of this action. It follows, necessarily, that the defendants are not liable to the government in this suit for any of the claims the government asserts, and that the Master should make his Findings of Fact and Conclusions of Law accordingly.

In conclusion counsel for the defendants desire the Master to know that they have been as brief as possible in presenting their claims as above. It is felt that those claims have merit, under the law and the facts, and that there is no basis, therefore, upon which the Master can, properly, and legally, make findings or conclusions adverse to the defendants.

If the Master desires, for his convenience, to have the undersigned counsel submit proposed findings and proposed conclusions of law, that will be done as soon as possible, upon request.

Respectfully submitted,

WOOD, COOKE & MOULTON,

By STERLING M. WOOD,

Attorneys for Defendants.

Service of the above and foregoing Brief of Defendants on Hearing before Master and receipt of true copy thereof is acknowledged this 11th day of February, A.D. 1955.

KREST CYR,

United States Attorney for the District of Montana,

and

DALE F. GALLES,

Assistant United States Attorney for the District of Montana,

By .....

Attorneys for the Plaintiff.

EXHIBIT B

"FINDINGS OF FACT REQUESTED BY THE DEFENDANTS OF THE SPECIAL MASTER, THE HON. WILLIAM G. BAUCUS, IN LETTER FROM DEFENDANTS' COUNSEL TO THE SAID WILLIAM G. BAUCUS, BEARING DATE OF FEBRUARY 28, 1955."

I.

That there is no evidence in the record that establishes, or tends to establish, that the defendants, or

either of the defendants in the sale of any of the dwellings in Calhoun Lane Subdivision, for which priorities assistance had been granted to the defendants, exceeded the maximum sales price of $8,000 for each of said dwellings, and that, accordingly, I find that the defendants did not exceed such maximum sale price in the sale of any of said dwellings, either through amounts charged to or paid by the purchasers, or any of such purchasers, or otherwise, or at all;

II.

That the sale price of $8,000, established as the maximum sale price for each dwelling in Calhoun Lane Subdivision, for the construction whereof priorities assistance was granted to the defendants, was not established upon the basis of express representations, or any representations, made by the defendants that the said maximum sale price included special assessments levied by public authorities for local improvements;

III.

That neither by virtue of Priorities Regulation 33, nor otherwise, or at all, did the maximum sale price of $8,000, for each dwelling in Calhoun Lane Subdivision, include special assessments levied by public authorities for any local improvements;

IV.

That the defendants have not been enriched, either unjustly, or at all, by reason of the fact that the purchasers of dwellings in Calhoun Lane Sub-

division are required under the laws of the State of Montana, to pay certain special assessments levied by public authorities of Montana against the said dwellings, and the appurtenant real estate, to cover the cost of local improvements made;

V.

That under the Veterans' Emergency Housing Act of 1946, and Section 3 (b) thereof, the statement therein directed to be filed by a builder involved is required to set forth "the fair market value of the land (immediately prior to construction) and improvements sold with the housing accommodations"; that the defendants, as the builders involved in this action, sold to the purchasers, here involved, only the land, and the housing accommodations constructed by the builders, and sold no improvements to such purchasers;

VI.

That the word "improvements," used in connection with construction work under the Veterans' Emergency Housing Act of 1946 and Priorities Regulation No. 33, as appears from the plain language of the said Act, has reference only to improvements other than housing accommodations owned by the builders and sold by the builders to the purchasers involved, and does not include or cover local improvements, such as paving, etc., constructed through action taken by public authorities with resultant special assessments levied under

state law against the land involved, and this finding of such fact is made accordingly;

VII.

That there are no construction defects and no construction omissions in any of the dwellings constructed by the defendants in Calhoun Lane Subdivision;

VIII.

That the defendants did not violate the Veterans' Emergency Housing Act of 1946, or the regulation involved, in constructing any of the dwellings in Calhoun Lane Subdivision;

IX.

That the defendants have not been unjustly enriched, or at all, nor have the purchasers involved been deprived of any things of value, to which they were entitled by the construction and by the sale made of the dwellings involved herein;

X.

That the defendants constructed and completed the housing accommodations, or dwelling units involved, and in substantial compliance with the written specifications, descriptions or materials and plans approved by the plaintiff, acting through the Federal Housing Administration, and that thereafter the Federal Housing Administration inspected and thereupon accepted the said dwellings so constructed and completed and as in full conformity with such specifications, descriptions and plans and as full performance by and on the part

of the defendants of their contract, or any other contract in the premises, or otherwise, for the construction and completion of the said housing accommodations, and in full satisfaction and in full discharge of the defendants under any such contract;

XI.

That on or about October 23rd, 1947, the Federal Housing Administration made Compliance Inspection Reports for all of the dwellings in Calhoun Lane Subdivision, constructed by the defendants, which Compliance Inspection Reports were duly executed and delivered and certified that building improvements had been acceptably completed after inspection, that there were no substantial variations from the approved drawings and descriptions of materials or specific conditions of the commitment and applicable requirements of the Federal Housing Administration, and that there had been such complete compliance that there was "a firm commitment" and that closing papers could be submitted, and that thereby the Federal Housing Administration approved the construction work done by the defendants and certified that there were no construction defects and no construction omissions on the part of the defendants, as the builders involved.

Note

Pages 200 - 202 are missing
or blank.

[Title of District Court and Cause.]

NOTICE OF MOTION

To Krest Cyr, Esq., United States Attorney for the District of Montana, and being also the attorney for the plaintiff in the above-entitled action:

You will please take notice that the undersigned will bring the attached motion on for hearing before the above-named Court, with the Hon. Charles N. Pray, as the Judge thereof, and in the courtroom in the Postoffice Building, in the City of Billings, County of Yellowstone, State of Montana, upon the opening day of the next session of the said Court at Billings, Montana, and at the hour of 10 o'clock a.m. of said day, or as soon thereafter as counsel can be heard.

Dated this 8th day of April, A.D. 1955.

WOOD, COOKE & MOULTON,

By /s/ STERLING M. WOOD,

Attorneys for the Defendants.

[Title of District Court and Cause.]

MOTION

The defendants move the Court as follows, to wit:

That, in accordance with paragraph (e) (2) of Rule 53, of the Federal Rules of Civil Procedure, the Court act on the report of the Master in the above-entitled action and upon the objections to

the said report heretofore served and filed herein by the said defendants, and that the said report of the Master be rejected in its entirety by the Court, and that such other action may be taken by the Court as is appropriate in the premises with respect to the matters referred to the Master for disposition.

Dated this 8th day of April, A.D. 1955.

WOOD, COOKE & MOULTON,

By /s/ STERLING M. WOOD,

Attorneys for the Defendants.

Service of copy acknowledged.

[Endorsed]: Filed April 9, 1955.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the undersigned, attorneys for the respective parties to the above-entitled action as follows, to wit:

That in the typing of the transcript of the proceedings taken before the Master in the above-entitled action, upon January 17th, 1955, certain inadvertent errors were made by the reporter, which should be corrected, and that, accordingly, the following corrections be now made in the said transcript, to wit:

That on page 6 of the said transcript the language thereof reading as follows: "It is further incompetent, in any event, in view of the appeal to the Housing and Land Act of 1947 of the Veterans Emergency Housing Act of 1946 which is an appeal clause in that act," be now corrected to read as follows: "It is further incompetent in any event, in view of the repeal of the Housing and Rent Act of 1947 by the Veterans Emergency Housing Act of 1946, by the repeal clause in that act."

That on page 7 of the said transcript, approximately line 7, the language thereof reading as follows: "My other objection is sustained?" be now corrected to read "My other objection is overruled?"

Dated at Billings, Montana, this 17th day of August, A.D. 1955.

KREST CYR,
United States Attorney for
the District of Montana;

By /s/ DALE F. GALLES,
Attorney for Plaintiff.

WOOD, COOKE & MOULTON,

By /s/ STERLING M. WOOD,
Attorneys for Defendants.

[Endorsed]: Filed August 19, 1955.

[Title of District Court and Cause.]

Civil No. 1089

ORDER

In the above-entitled cause this court on October 4, 1950, filed its decision denying the motion to dismiss by defendants; it is a civil action brought by plaintiff under the provisions of 2(a)(6), Title III, of the Second War Powers Act (56 Stat. 176, 50 App. U. S. C. 633), 1 Sections 7(a) and 7(c) of the Veterans Emergency Housing Act of 1946 (60 Stat. 207, 50 U. S. C. A. App. Section 1821 et seq.).

The cause was next before this court on the motion of plaintiff to strike certain portions of the answers filed by the defendants, and also on plaintiff's motion for summary judgment upon part of the plaintiff's claim as set forth in the amended complaint, pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure, which said part of the plaintiff's claim pertained solely to Yellowstone County Rural Special Improvement District Number 73 tax lien levied and assessed against the 24 dwellings involved herein; pursuant to Section 944.54 (g) (ii) of Priorities Regulation 33; that the above-mentioned motions were granted in the decision of this court filed on July 30, 1951. The decision of this court of November 21, 1951, denied the motion of defendants seeking to change the language of the above order, and made the finding that the summary judgment was a final judgment.

Thereafter defendants appealed from the partial summary judgment, being cause No. 13267 in the

Court of Appeals, and the opinion filed January 4, 1954, reversed the partial summary judgment and remanded the cause to this court for such further proceedings as may appear to this court to be necessary and proper.

Following the remand of the cause the file reveals that under date of April 16, 1954, the plaintiff filed and served written interrogatories upon defendants A. W. Hartwig and Jeff Tingle; on May 7, 1954, the defendants filed joint answers to the said interrogatories, and by reason of the prior decisions of this court herein referred to it appears that the issues therein were previously disposed of in the pleadings or in the master's report and the decision of the court herein.

Upon motion of plaintiffs this court on November 18, 1954, appointed a special master to hear and determine the issues of fact involved herein, pursuant to the provisions of Rule 53 of the Federal Rules of Civil Procedure, and to report to the court his findings of fact and his conclusions therein, i.e.,

(a) The amounts, if any, charged to or paid by the purchasers and each of them or their successors in interest, in excess of the maximum authorized sales price of $8,000 for each dwelling as detailed in Exhibit A of the amended complaint on file herein;

(b) The reasonable value of the construction defects and omissions, if any, of each dwelling as detailed in Exhibit A of the amended complaint on file herein.

After a preliminary meeting with counsel for both sides on December 6, 1954, the special master held hearings at Billings Montana, on January 17th and 18th, 1955.

The report of the special master herein was filed on May 7, 1955, and after a review of the transcript of the proceedings and exhibits filed in the hearing before the special master, and after due consideration of all of the matters therein and briefs of counsel, this court is now of the opinion that the findings of fact and conclusions thereon of the special master should be accepted and approved by this court and incorporated herein and made a part hereof, and such is the order of this court.

In the proceedings before the special master the counsel for defendants interposed numerous objections upon the various grounds stated therein, which said objections were overruled by the special master, and, after due consideration by this court it appears that the said objections should be overruled by this court, especially in view of the said prior decisions of this court, and such is the order of court herein.

The findings of fact and conclusions thereon of the special master are as follows:

Findings of Fact

(a) The Special Master makes the following findings of fact as to the amounts, if any, charged to or paid by the purchasers, and each of them, or their successors in interest, in excess of the maximum

authorized sales price of $8,000.00 for each dwelling as described in Exhibit A of the amended complaint on file herein:

1. That said sum of $8,000.00 was charged to or paid by the purchasers, and each of them, or their successors in interest.

2. That in addition thereto the amount of the special improvement taxes assessed against each lot as hereinafter set forth was charged to or paid by the purchasers, and each of them, or their successors in interest.

3. That the maximum authorized sales price of $8,000.00 was intended by the parties to include the special improvements for which said special improvement taxes were levied. This finding of fact is compelled by Exhibit 15 in the face of which subsequent conflict in the testimony and argument by learned counsel for the defense must fail. The representations by the defendants that street and utility improvements would be installed by them and included in the sale price and that the purchasers would not be required to pay any special assessments, as made in said Exhibit 15, are clear and unambiguous and were not altered by other exhibits or testimony.

(b) The Special Master makes the following findings of fact as to the reasonable value of the "construction defects and omissions," if any, of each dwelling as described in Exhibit A of the amended complaint on file herein:

1. That the reasonable value of the variations in construction of said dwellings is the same amount as reflected in said Exhibit A as being "construction defects and omissions."

2. That the construction of said dwellings was subject to inspection and was inspected by representatives of the Federal Housing Administration, which representatives indicated both verbally and in writing that the variations were not such as to cause non-compliance with the plans and specifications.

3. That it is the opinion of the Special Master that the approval of the variations by the representatives of the Federal Housing Administration was not within the scope of their authority. (See decision of the above-entitled Court dated July 30, 1951.)

Conclusions

Wherefore, the Special Master after fully considering the evidence and the objections to the admission thereof and being fully advised in the premises, concludes as follows:

(a) The amounts charged to or paid by the purchasers, and each of them, or their successors in interest, (being the Rural Special Improvement District No. 73 tax liens levied and assessed against each lot) in excess of the maximum authorized sales price of $8,000.00 for each dwelling as described in Exhibit A of the amended complaint on file herein, are as follows:

Name of Purchaser	Lot	Block	Amount
Swan C. Anderson	17	2	$1,095.97
Leonard O. Apps	8	2	1,095.97
E. R. Bahn	6	2	1,095.96
R. R. Bailey	4	3	1,086.57
J. R. Derden	2	2	1,045.59
W. A. Crutcher	9	2	1,095.96
Alva A. Harms	1	2	1,095.96
Roy W. Hodge	7	2	1,095.96
Ivan F. Hutchens	15	2	1,095.98
LeRoy D. Jensen	18	2	1,095.97
Charles Kuhne	12	2	1,095.96
A. R. Marquardt	7	3	1,141.28
R. B. McGinnis	8	3	1,075.99
F. J. Newman	4	2	1,064.14
Leonard W. Noyes	10	2	1,080.09
John H. Nickerson	16	2	1,095.96
N. A. Potter	3	3	1,168.03
Merle R. Price	14	2	1,064.14
Jimmie Scott	1	3	1,094.64
R. M. Stearns	13	2	1,095.97
Louis P. Studer	5	2	1,138.40
John C. Wade	6	3	1,065.58
Howard A. Walter	3	2	1,095.97
Roy N. Watne	5	3	1,110.16

(b) The reasonable values of the "construction defects and omissions" of each dwelling as described in Exhibit A of the amended complaint on file herein, are as follows:

Name of Purchaser	Lot	Block	Amount
Swan C. Anderson	17	2	$1,010.33
Leonard O. Apps	8	2	1,188.75
E. R. Bahn	6	2	1,218.75
R. R. Bailey	4	3	1,263.75
J. R. Derden	2	2	1,238.75
W. A. Crutcher	9	2	1,208.75
Alva A. Harms	1	2	1,214.11
Roy W. Hodge	7	2	1,197.95
Ivan F. Hutchens	15	2	1,164.05

Name of Purchaser	Lot	Block	Amount
LeRoy D. Jensen	18	2	1,268.63
Charles Kuhne	12	2	1,219.95
A. R. Marquardt	7	3	1,218.75
R. B. McGinnis	8	3	1,253.00
F. J. Newman	4	2	1,221.00
Leonard W. Noyes	10	2	1,171.31
John H. Nickerson	16	2	1,262.25
N. A. Potter	3	3	1,214.11
Merle R. Price	14	2	1,207.95
Jimmie Scott	1	3	1,249.80
R. M. Stearns	13	2	1,219.95
Louis P. Studer	5	2	1,253.00
John C. Wade	6	3	1,233.00
Howard A. Walter	3	2	1,207.95
Roy N. Watne	5	3	1,202.75

The foregoing concludes the report of the special master, however, the review of the record by the court reveals that counsel for the respective parties for clarification and distinction of the items set forth in Exhibit A of the amended complaint failed to segregate the issues in this cause into three (3) parts, as follows:

1. Rural special improvement district No. 73 tax liens levied and assessed against each of the 24 lots and dwellings involved herein as set forth in paragraph (a) above.

2. Construction defects and omissions as to each of the 24 lots and dwellings involved herein as set forth in paragraph (b) above.

3. Direct overcharges as to nine (9) of the 24 lots and dwellings involved herein, which are detailed in Exhibit A of the amended complaint and also Plaintiff's Exhibit No. 14, "Item No. 6, excess

cost of electric fixtures," in the proceedings before the special master.

Since there was no report made by the special master as to part three (3), which is segregated above, it is necessary that this court making the findings and upon consideration of the record herein it is the finding of this court that the following direct overcharges for electric fixtures were in excess of the maximum sales price of $8,000.00, being detailed in Exhibit A as to 9 of the 24 dwellings, and in the following amounts:

Name of Purchaser	Lot	Block	Amount
Leonard O. Apps	8	2	$ 55.00
E. R. Bahn	6	2	55.00
R. R. Bailey	4	3	55.00
J. R. Derden	2	2	55.00
Charles Kuhne	12	2	5.00
Leonard W. Noyes	10	2	55.00
Merle R. Price	14	-	55.00
John C. Wade	6	3	55.00
Howard A. Walter	3	2	55.00

In the proceedings before the special master some of the vital evidence and stipulations, including documentary evidence, which show a preponderance of proof in favor of the plaintiff, are as follows:

"(Stipulation No. I reads as follows.) Transcript page 11.

"Counsel for plaintiff and counsel for defendants stipulate and agree:

"A. That Rural Special Improvement District No. 73 was initiated by defendants' filing of a petition with the county commissioners of Yellowstone

County, Montana, on September 18, 1946, and that thereafter on October 5, 1946, a resolution was adopted by said county commissioners creating Rural Special Improvement District No. 73 to include sanitary sewers, water mains, concrete curbs and gutters, and street paving; that following the creation of said Rural Special Improvement District, the contract was awarded to A. W. Hartwig Pipe Line Construction Company, the lowest and best of three bidders, on November 6, 1946; and that prior to the date of sale of each of the houses as set forth in Exhibit A of the amended complaint the sewer and water lines of said Rural Special Improvement District were installed and completed; that the concrete curbs, gutters and street paving of said Rural Special Improvement District No. 73 were completed in some instances prior to the date of sale as set forth in Exhibit A of the amended complaint, and that in the case of other houses in connection with which these latter improvements were completed after the date of sale set forth in said Exhibit A the purchasers of these houses would testify under oath and on the witness stand that defendant A. W. Hartwig represented to them that the curbs, gutters and street paving would be completed; that the resolution of the county commissioners levying the tax upon the property within Rural Special Improvement District No. 73 was adopted October 15, 1947, and resolution of final adoption was on October 23, 1947; that all of the work in connection with said Rural Special Improvement District was completed on or before June 30, 1947; and that de-

fendants A. W. Hartwig and Jeff Tingle were the sole owners of the property within the Rural Special Improvement District No. 73 from the filing of the petition to create said Rural Special Improvement District until the sales to the various owners as set forth in Exhibit A of the amended complaint."

It was stipulated and agreed by counsel that the record from the County Treasurer's office with reference to Special Improvement District No. 73 tax liens read into the record in detail were true and correct as to the purchaser, or successor in interest, lot and block numbers and amount of tax liens assessed and date of payment, if any, by the owner.

As an explanation of the reason for the difference between the amounts as to each dwelling detailed in Exhibit A of the amended complaint on page 1 after the item "Special Improvement Lien and Interest: $1175.49," as compared with the conclusions of the special master of lot 17, block 2, Swan C. Anderson being the purchaser, amount $1,095.97 as shown by the record of the County Treasurer, the difference of $79.52 being interest from the date of sale of the dwelling to Swan C. Anderson on May 27, 1947, until the filing of the original complaint herein on October 8, 1948, and since the issue of interest as to each of the said tax liens levied and assessed was not included in the report of the special master it is necessary that this court make such findings, and, upon consideration of the record herein, it is the finding of this court that interest be paid to the purchasers

of each of the said 24 dwellings, or their successors in interest as their interests may appear from the county records with respect to ownership and date of payment of said tax liens, and such is the order of court herein as to each dwelling detailed in Exhibit A of the amended complaint; interest rate being 6% per annum.

It was further stipulated and agreed between counsel that officials of the Federal Housing Administration and the expert witnesses designated would testify that detailed inspections were made of each of the 24 houses listed in Exhibit A and that there were deviations between the plans and specifications as shown by Exhibits Nos. 5 to 13, inclusive.

"(Stipulation No. II reads as follows:

"It is further stipulated and agreed that Leroy D. Jensen, one of the original purchasers of one of the houses involved as described on page 10 of Exhibit A of the amended complaint, under oath and on the witness stand, would testify that in the office of A. W. Hartwig in Billings, Montana, and in the presence of Mrs. Jensen, as well as Mr. W. C. Jennings, defendant A. W. Hartwig during the course of negotiations for the sale and purchase of Lot 18 in Block 2, Calhoun Lane Subdivision, Billings, Montana, stated to Mr. Jensen that all special improvements were to be paid for by the builder.

"It is further stipulated that the following named original purchasers under oath and on the witness stand would testify that defendant A. W. Hartwig

represented to them personally that the special improvements were included in the sales price of $8,000.00, R. R. Bailey, Roy W. Hodge, R. B. McGinnis, F. J. Newman, Mrs. John H. Nickerson, Jimmie Scott and H. A. Walter."

Exhibit No. 15, being Federal Housing Administration Subdivision Form (FHA Form No. 2084), submitted May 18, 1946, for Calhoun Lane West of Billings, Montana, by sponsor of development, Hartwig & Tingle, Fratt Building, Billings, shows as to Item 7. Taxes and Special Assessments: "* * * (b) What special assessments will purchasers be required to pay? None. (c) Are all contemplated street and utility improvements ~~to be paid by assessment~~ or installed by developer and included in sale price? Yes. * * * The undersigned represent that to the best of their knowledge and belief the statements, information and conditions contained herein are true and correct, and the required exhibits are attached hereto in duplicate. (Signed) Hartwig & Tingle By A. W. Hartwig, Part."

Exhibit No. 18, "Federal Housing Administration Mortgagee's Application for Mortgage Insurance, case No. 31 006173, (FHA Form No. 2004), (Revised June, 1944), dated May 18th, 1946, by Security Trust and Savings Bank, Billings, Montana, by ....., President. Mortgagors' Statement signed by A. W. Hartwig, mortgagor, and Verna B. Hartwig, co-mortgagor, May 18, 1946, Mortgagors' Property Description, Lot 8, Bk. 2, Bruce 1Ave., Billings, Yellowstone County, Mon-

tana, legal description Lot 8, Block 2—Calhoun Lane Subdivision, Billings, Montana, * * * "G. Taxes and Insurance * * * 3. Special assessments: Total amount outstanding, $ none. Dated June 6, 1946. Approved Regular BMB Preliminary Examiner."

Exhibit No. 19. "Real Estate Sales Contract. This contract, made and entered into this 27th day of December, 1946, by and between Hartwig & Tingle of the county of Yellowstone, State of Montana, the seller, and L. D. and Barbara Jensen of the county of Yellowstone, State of Montana, the buyer,

"Witnesseth: That the sellers have bargained and sold to the said buyers the following described real estate, situated in the county of Yellowstone, State of Montana, to wit: All of lot 18, block 2 of Calhoun Subdivision to Billings, Montana, with all improvements—at and for the price and sum of Eight Thousand Dollars to be paid as follows: One Thousand Dollars at the signing of this contract, the receipt of which is hereby acknowledged by the seller, and which amount is deposited with Hartwig & Tingle as a part of the consideration of said sale; and the balance whereof is to be paid in the following manner, to wit: Upon approval and acceptance of an F. H. A. commitment for $5,400.00 and a second mortgage approved and guaranteed by Veterans Administration for $1,600.00.

"The sellers to furnish within 30 days from the date hereof an abstract of title to said property showing said property to be free of all mortgages,

mechanic and tax liens except such as are assumed by the buyer and if upon examination of said abstract it is found that the seller has a good title to said property, then said seller is to execute and deliver to said buyer a good and sufficient deed to said property, conveying to said buyer all the right, title and interest to the said seller in and to said property as per terms and conditions of this sale as above set forth. * * * In Witness Whereof, The said parties have hereunto set their hands and seals the day and year first above written.

"DORIS M. McGINNIS,
"Witness;

"W. D. JENNINGS,
"Witness;

"LeROY D. JENSEN,
"Witness;

"BARBARA E. JENSEN,

"HARTWIG AND TINGLE,

"By A. W. HARTWIG."

Defendant Jeff Tingle testified in the special master proceedings that he had complete over-all supervision of the construction work of Hartwig & Tingle on the Calhoun Lane Subdivision and denied that there were any construction defects or omissions in the said dwellings, but contending the al-

leged defects and omissions were really necessary substitutions because of the condition of material scarcity and price increases and had been approved by the F. H. A. inspectors as to the deviations between the plans and specifications, verbally and by inspection reports and also by Exhibit No. 20 which is the final compliance and inspection report of October 23, 1947. The above contentions were disposed of in a prior decision of this court filed on July 30, 1951, which said decision is hereby made a part of this decision and which was referred to by the Special Master.

Defendant A. W. Hartwig testified he was the contractor who entered into the arrangements with the F.H.A. involving the Calhoun Lane Subdivision but did not handle the transactions with people who purchased lots, which was handled through the Security Trust and Savings Bank; the deeds were prepared in blank and left with the bank to conclude the details with the purchasers; that his firm requested the Board of County Commissioners to create the special improvement district, and in his examination of the F.H.A. papers he did not find anything about special improvement assessments; that he did not have anything to do with the contract between his firm and LeRoy D. and Barbara E. Jensen which was probably drawn in his office; that the F.H.A. from their constant inspections knew about the special improvements; that he never made any statement to Mr. Jensen, as stated in the

stipulation herein, that all special improvements were to be paid for by the builder, and that he had no discussions with Mr. Jensen about the facilities to be provided; that the stipulation "that the following named original purchasers would testify that you represented to them personally that the special improvements were included in the sale price of $8,000.00, and the persons named are R. R. Bailey, Roy W. Hodge, R. B. McGinnis, F. J. Newman, Mrs. John H. Nickerson, Jimmie Scott and H. A. Walter" was a false statement; that he did not make any statement to any one of those persons and did not remember having any conversations with them on that subject; that as a result of the compliance inspection report, Exhibit 20, he got a final settlement from the bank of $8,000.00 on each of the loans involved; that this lawsuit was commenced in 1948 and prior to that time no demands had been made upon him either to pay the special assessments or to take care of the alleged defects or omissions; that an increase in the maximum sales price to $8,000.00 was granted by the F.H.A. because of the increase in the cost of materials and heating systems being changed from hot water system to radiant heat and not because of providing a public sewer rather than septic tanks; that the $8,000.00 did not include the special improvement assessments and the purchasers and owners of the houses were obligated to that special improvement district as far as he was concerned, and he didn't pay any of the special improvement district

assessments; that as of May 18, 1946, the date of Exhibit No. 15, there were no special improvement assessments contemplated or levied and no assessments against the properties at that time; that his company was awarded the contract for the construction of the special improvement district in the fall of 1946 and knew the cost of the installation of the improvements.

It is the opinion of the court from a review of the pleadings, proceedings and evidence herein, and particularly the documentary evidence, that a conclusive preponderance of the evidence has been established by the plaintiff as to all of the issues involved herein, and that the relief prayed for by plaintiff in the amended complaint herein be granted, and such is the order of court herein, including costs. Exceptions allowed counsel.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed January 6, 1956.

In the United States District Court for the District of Montana, Billings Division

Civil No. 1089

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. HARTWIG and JEFF TINGLE,

Defendants.

JUDGMENT

On January 6, 1956, the Court made and entered its findings, conclusions and decision on all the issues of fact and law herein based on the record of all proceedings in the above-entitled action, including the Report of the Special Master; now, therefore, pursuant thereto,

It Is Ordered and Adjudged that plaintiff, the United States of America, have judgment on Count I of the Amended Complaint herein against the defendants, A. W. Hartwig and Jeff Tingle, for the sums set forth as the reasonable value of the "construction defects and omissions" together with the sums of interest thereon from the respective dates of sale as set forth in the Amended Complaint herein to the date hereof, at the rate of 6 per cent per annum, being a total of $44,501.33, as follows:

Name of Purchaser	Dwellings Lot	Block	Principal	Interest from Date of Sale to Date	Total
Swan C. Anderson	17	2	$1,010.33	$528.06	$1,538.39
Leonard O. Apps	8	2	1,188.75	620.73	1,809.48
E. R. Bahn	6	2	1,218.75	646.76	1,865.51
R. R. Bailey	4	3	1,263.75	661.81	1,925.56
J. R. Derden	2	2	1,238.75	647.47	1,886.22

Name of Purchaser	Dwellings Lot	Block	Principal	Interest from Date of Sale to Date	Total
W. A. Crutcher	9	2	$1,208.75	$647.07	$1,855.82
Alva A. Harms	1	2	1,214.11	642.00	1,856.11
Roy W. Hodge	7	2	1,197.95	635.61	1,833.56
Ivan F. Hutchens	15	2	1,164.05	610.14	1,774.19
LeRoy D. Jensen	18	2	1,268.63	681.97	1,950.60
Charles Kuhne	12	2	1,218.75	638.64	1,858.59
A. R. Marquardt	7	3	1,218.75	632.75	1,851.50
R. B. McGinnis	8	3	1,253.00	662.42	1,915.42
F. J. Newman	4	2	1,221.00	651.00	1,872.00
Leonard W. Noyes	10	2	1,171.31	641.69	1,813.00
John H. Nickerson	16	2	1,262.25	682.53	1,944.78
N. A. Potter	3	3	1,214.11	634.72	1,848.83
Merle R. Price	14	2	1,207.95	645.17	1,853.12
Jimmie Scott	1	3	1,249.80	650.46	1,900.26
R. M. Stearns	13	2	1,219.95	636.00	1,855.95
Louis P. Studer	5	2	1,253.00	655.32	1,908.32
John C. Wade	6	3	1,233.00	633.26	1,866.26
Howard A. Walter	3	2	1,207.95	639.30	1,847.25
Roy N. Watne	5	3	1,202.75	637.86	1,840.61

and that plaintiff have judgment on Count I of the Amended Complaint herein against said defendants for the sums set forth as the direct over-charges for electric fixtures together with the sums of interest thereon from the respective dates of sale set forth in the Amended Complaint herein to the date hereof at the rate of 6 per cent per annum, being a total of $608.16, as follows:

Name of Purchaser	Principal	Interest from Date of Sale to Date	Total
Leonard O. Apps	$55.00	$28.74	$83.74
E. R. Bahn	55.00	29.21	84.21
R. R. Bailey	55.00	28.82	83.82
J. R. Derden	55.00	28.77	83.77
Charles Kuhne	5.00	2.62	7.62
Leonard W. Noyes	55.00	29.39	84.39
Merle R. Price	55.00	29.38	84.38
John C. Wade	55.00	29.12	84.12
Howard A. Walter	55.00	29.11	84.11

It Is Further Ordered and Adjudged that the plaintiff, the United States of America, have judgment on Count II of the Amended Complaint herein against the defendants, A. W. Hartwig and Jeff Tingle, for the sums set opposite their respective names, together with the interest thereon set forth at the rate of 6 per cent per annum from the dates said levies or taxes were paid as appears in the record of the hearing before the Special Master to the date hereof, being a total of $32,673.62, as follows:

Name of Purchaser	Dwellings Lot	Block	Principal	Interest to Date	Total
Swan C. Anderson	17	2	$1,095.97	$290.44	$1,386.41
Leonard O. Apps	8	2	1,095.97	282.85	1,378.82
E. R. Bahn	6	2	1,095.96	290.44	1,386.40
R. R. Bailey	4	3	1,086.57	278.92	1,365.49
J. R. Derden	2	2	1,045.59	368.54	1,414.13
W. A. Crutcher	9	2	1,095.96	290.44	1,386.40
Alva A. Harms	1	2	1,095.96	274.73	1,370.69
Roy W. Hodge	7	2	1,095.96	272.54	1,368.50
Ivan F. Hutchens	15	2	1,095.98	287.70	1,383.68
LeRoy D. Jensen	18	2	1,095.97	288.98	1,384.95
Charles Kuhne	12	2	1,095.96	289.71	1,385.67
A. R. Marquardt	7	3	1,141.28	97.93	1,239.21
R. B. McGinnis	8	3	1,075.99	272.23	1,348.22
F. J. Newman	4	2	1,064.14	343.14	1,407.28
Leonard W. Noyes	10	2	1,080.09	315.95	1,396.04
John H. Nickerson	16	2	1,095.96	272.54	1,368.50
N. A. Potter	3	3	1,168.03	None	1,168.03
Merle R. Price	14	2	1,064.14	343.14	1,407.28
Jimmie Scott	1	3	1,094.64	282.44	1,377.08
R. M. Stearns	13	2	1,095.97	288.25	1,384.22
Louis P. Studer	5	2	1,138.40	134.56	1,272.96
John C. Wade	6	3	1,065.58	317.43	1,383.01
Howard A. Walter	3	2	1,095.97	283.32	1,379.29
Roy N. Watne	5	3	1,110.16	221.25	1,331.41

It Is Further Ordered and Adjudged that the plaintiff, the United States of America, have judgment against the defendants, A. W. Hartwig and Jeff Tingle, for its costs and disbursements in this action, to be hereinafter taxed, on notice, and hereinafter inserted by the Clerk of this Court in the sum of $541.50.

Dated this 24th day of February, 1956.

/s/ CHARLES N. PRAY,
United States District Judge.

[Endorsed]: Filed and entered February 24, 1956.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the undersigned counsel for the respective parties to the above-entitled action as follows, to wit:

That if the Defendants in the said action shall appeal to the United States Court of Appeals for the Ninth Circuit from the judgment in said action filed and entered on the 24th day of February, 1956, which said judgment is in favor of the Plaintiff and against the Defendants, that, subject to the approval of the United States Court of Appeals for the Ninth Circuit, and for the purpose of avoiding a duplication of record conditions in the said United States Court of Appeals for the Ninth Circuit should such

appeal be taken from the aforesaid judgment, there shall be considered on such appeal, so far as applicable, the printed transcript of record in Case No. 13,267 in the said United States Court of Appeals for the Ninth Circuit, which said Case No. 13,267 is an appeal previously taken, in January, 1952, from an Order in the above-entitled action, and contains the pleadings and other records in the said above-entitled action that should be considered by the United States Court of Appeals for the Ninth Circuit if an appeal is taken from the aforesaid judgment of February 24, 1956.

Dated at Billings, Montana, this 6th day of April, A.D. 1956.

KREST CYR,
United States Attorney;

/s/ DALE F. GALLES,
Assistant U. S. Attorney.

/s/ STERLING M. WOOD,
Attorney for Defendants.

[Endorsed]: Filed April 17, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that A. W. Hartwig and Jeff Tingle, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth

Circuit from the judgment, and the whole thereof, entered in the above-entitled action on the 24th day of February, 1956.

Dated this 20th day of April, A.D. 1956.

/s/ STERLING M. WOOD,
Attorney for Appellants, A. W. Hartwig and Jeff Tingle.

[Endorsed]: Filed April 20, 1956.

[Title of District Court and Cause.]

BOND FOR COSTS OF APPEAL

We, the undersigned, jointly and severally acknowledge that we and our personal representatives and successors are bound to pay to the above-named Plaintiff the sum of Two Hundred Fifty and No/100 ($250.00) Dollars.

The condition of this bond is that whereas the Defendants, A. W. Hartwig and Jeff Tingle, have appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed April 20, 1956, from the judgment of this Court entered February 24, 1956, each of the said Defendants shall pay all costs adjudged against them if the appeal is dismissed or the judgment is affirmed or such costs as the Appellate Court may award if the judgment is modified, then this bond to be void, but if the Defendants fail to perform this condition, the payment of the amount of this bond shall be due forthwith.

Dated April 20, 1956.

/s/ A. W. HARTWIG,

/s/ J. TINGLE,

Defendants, Billings, Mont.

[Seal]

THE GENERAL CASUALTY COMPANY OF AMERICA, a Corporation,

By /s/ [Indistinguishable],

Surety, Attorney-in-Fact.

Signed and acknowledged before me this 20th day of April, 1956.

[Seal] /s/ BERT E. JOHNSTON,

Notary Public for the State of Montana.

My commission expires May 19, 1958.

[Endorsed]: Filed April 20, 1956.

In the District Court of the United States, in and for the District of Montana, Billings Division

Civil No. 1089

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. W. HARTWIG and JEFF TINGLE,

Defendants.

Before: Honorable William G. Baucus, Special Master.

TRANSCRIPT OF HEARING BEFORE SPECIAL MASTER

Appearances:

For Plaintiff:

MR. DALE F. GALLES,
Assistant U. S. District Attorney.

For Defendants:

MR. STERLING M. WOOD of
WOOD, COOKE & MOULTON.

Proceedings

January 17, 1955—10:00 A.M.

Mr. Baucus: This hearing is in the matter of the United States of America, Plaintiff, versus A. W. Hartwig and Jeff Tingle, Civil No. 1089. This is a hearing held in accordance with an order for reference of appointment of special master dated November 18, 1954, and pursuant to an order fixing hearing dated January 3, 1955.

Are you ready to proceed, Mr. Galles?

Mr. Galles: The Government is ready to proceed.

Mr. Baucus: Are you ready to proceed, Mr. Wood?

Mr. Wood: Yes, we are.

Mr. Galles: After discussing this matter with Mr. Wood, counsel for the defendants, we have agreed and are able to shorten to a considerable extent some of the matters to be determined by this hearing. Am I correct, Mr. Wood?

Mr. Wood: If I may just add this: I want the record to show at this time that we object to the introduction of any evidence before the Master, upon the ground that the amended complaint fails to state a claim against the defendants, either jointly or separately, in either and in both of the counts involved, upon which relief can be granted. We can make that as a general objection to the introduction of any evidence, and will not renew it, but will ask that it be applied to everything that is put in evidence by the Government upon this hearing.

Mr. Baucus: The objection is overruled, and the defendants may have their exception.

Mr. Wood: Now then, we have the understanding, Mr. Galles and I, that, to save much formal proof in the shape of [3*] original documents that might have to be brought over from the Court House and elsewhere, he may read into the record what the figures involved are, and that will be acceptable to us, and we will make no objection to their competency. And in that connection—you can check me if I am not stating it exactly as you desire it—Exhibit A which is attached to the amended complaint is conceded to be correct as to the figures and data involved, in this respect: the name of the purchaser, the lot involved, the date of sale, and the maximum sale price.

That is all that you want in there, and then you are going to read these other figures, are you not?

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Mr. Galles: Yes, the maximum sale price.

Mr. Wood: Mr. Galles suggests further in that connection that we agree that the maximum sales price of $8,000 included these figures, that is the maximum sale price that was set by the F.H.A. in connection with these figures. Furthermore, however, I want to register an objection to any evidence with respect to the so-called special improvement lien and interest, upon the ground that it is irrelevant at this stage, no proper or sufficient foundation having been laid for the introduction of any such evidence.

Does that put the record in shape for you?

Mr. Galles: Yes.

I am about to read into evidence some matters. Do you wish to rule on the objection first?

Mr. Baucus: Well, I will sustain the objection until you lay the foundation.

Mr. Galles: My understanding is that the [4] Priorities Regulation No. 33 is the foundation upon which evidence as to improvements, and particularly special improvements, may be received in evidence, which regulation is alleged in the complaint and a regularly published document of the Government so as to make it a matter of judicial knowledge. The regulation reads as follows: in Section 944.54, Paragraph G (2), II. "A builder must not sell a one-family dwelling unit, or converted under the reconversion housing plan, including the land and all improvements, including garage if provided, for more than the maximum sales price specified in the application, including within this sales price the

amount of any brokerage fees or commissions paid in connection with the sale, whether paid by the builder or by the purchaser."

That is the end of the quotation. The applicant to which that reference is made of course is the applicant for priorities with which to secure materials to build these houses, and in that connection, of course, the maximum sales price for the houses as applied for in the preference rating was set by the F.H.A., to which Mr. Wood referred, and which is alleged in the complaint in Exhibit A.

The sale price, as admitted by these defendants in answers to interrogatories, was set at $8,000, which is in the Court file. The special improvement district assessments were not included in that $8,000, as admitted in those same answers to interrogatories, and that these defendants did not pay or assume to pay these special improvement district assessments also is stated in the written answers to interrogatories. [5]

It is based upon those matters, the allegations in the complaint, the regulation referred to in the complaint, and the matters that have heretofore been determined by written interrogatories, that we submit as the foundation upon which the special improvement district evidence may be received.

Mr. Baucus: Your objection was as to the relevancy, Mr. Wood?

Mr. Wood: My objection was, of course—yes, put it that way, to the relevancy, upon the ground that no sufficient or proper foundation had been laid. I would like to amplify that objection by

adding the following:

It is further incompetent in any event, in view of the repeal of the Housing and Rent Act of 1947 by the Veterans' Emergency Housing Act of 1946, by the repeal clause in that Act.

Mr. Baucus: Well, that objection will be overruled.

Mr. Galles: As I understand it, Mr. Wood, we may agree insofar as the Special Improvement District No. 73 is concerned, which is the one that applies to the property involved in this lawsuit, that the resolution of the County Commissioners creating that special improvement district was passed October 5, 1946; that thereafter other proceedings were had, including the awarding of the contract, the filing of the bond, and finally, on October 15, 1947, the resolution levying the tax upon the property included in the special improvement district was adopted by the County Commissioners.

Mr. Wood: What date was that?

Mr. Galles: October 15, 1947. [6]

Mr. Wood: Thank you.

Mr. Galles: And the resolution of final adoption of the special improvement district was passed on October 23, 1947.

Mr. Wood: Well, it is understood, of course, as we told you at the outset, that I am not making any objection to the character, I am not requiring you to produce any written records, or anything of that kind.

My other objection is overruled?

Mr. Baucus: Yes, that's right.

Mr. Galles: Did you state for the record that that would be agreed upon as a fact, the items that I read with reference to Special Improvement District No. 73?

Mr. Wood: In order that there may be no doubt about it, I do agree, yes.

Mr. Galles: Thank you.

Mr. Wood: I also agree that the figures Mr. Galles is about to read to the Master are the correct amounts of the assessments involved against the property that is in controversy.

Mr. Galles: And that were paid?

Mr. Wood: And that were paid or not, as the case may be.

Mr. Galles: Very well.

With reference to Special Improvement District No. 73, to which Mr. Wood has just referred, we have been supplied with a record from the County Treasurer's office, which has been examined, or rather scanned, by Mr. Wood, I should say, and not examined, and upon my representation that the figures [7] are correct that I am about to read, as taken from the document prepared by the County Treasurer. This will represent the name of the purchaser of the house, and in the order contained in Exhibit A attached to the amended complaint, that is commencing with Swan C. Anderson, owner of Lot 17, Block 2, fully paid, $1095.97, on September 11, 1951; Leonard O. Apps, owner of Lot 8, Block 2, paid $1095.97, on October 24, 1951; E. R. Bahn, owner of Lot 6, Block 2, paid $1095.96, on September 11, 1951; R. R. Bailey, owner of Lot 4, Block 3,

paid $1086.57, on November 2, 1951; J. R. Derden, owner of Lot 2, Block 2, paid $1045.59, on March 28, 1950; W. A. Crutcher, owner of Lot 9, Block 2, paid $1095.96, on September 10, 1951; Alva A. Harms, owner of Lot 1, Block 2, paid $1095.96, on December 7, 1951; Roy W. Hodge, owner of Lot 7, Block 2, paid $1095.96, on December 19, 1951; Ivan F. Hutchens, owner of Lot 15, Block 2, paid $1095.98, on September 28, 1951; LeRoy D. Jensen, owner of Lot 18, Block 2, paid $1095.97, on September 20, 1951; Charles Kuhne, owner of Lot 12, Block 2, paid $1095.96, on September 14, 1951; A. R. Marquardt, owner of Lot 7, Block 3, paid $1141.28, on September 8, 1954; R. B. McGinnis, owner of Lot 8, Block 3, paid $1075.99, on November 26, 1951; F. J. Newman, owner of Lot 4, Block 2, paid $1064.14, on September 29, 1950; Leonard W. Noyes, owner of Lot 10, Block 2, paid $1080.09, on March 29, 1951; John H. Nickerson, owner of Lot 16, Block 2, paid $1095.96, on December 20, 1951; N. A. Potter, owner of Lot 3, Block 3, paid $1168.03, which has not been completely paid, and in connection with this particular assessment Mr. Potter apparently from the record is paying it out at the yearly rate, which will [8] expire in 1956, but, projecting the amount which he will have completely paid, the amount is $1168.03, as stated; Merle R. Price, owner of Lot 14, Block 2, paid $1064.14, on September 29, 1950; Jimmie Scott, owner of Lot 1, Block 3, paid $1094.64, on October 25, 1951; R. M. Stearns, owner of Lot 13, Block 2,

paid $1095.97, on September 15, 1951; Louis P. Studer, owner of Lot 5, Block 2, paid $1138.40, on February 15, 1954; John C. Wade, owner of Lot 6, Block 3, paid $1065.58, on February 27, 1951; Howard A. Walter, owner of Lot 3, Block 2, paid $1095.97, on October 23, 1951; Roy N. Watne, owner of Lot 5, Block 3, paid $1110.16, on October 28, 1952.

I might further state that the names read were the names alleged in the complaint as being the owners at the time. I believe the records will further show in the County Court House that in some of these cases the houses were sold, and the successors interest made these payments.

Mr. Wood: I am willing to have the record so show, subject to the objections that I have made.

Mr. Galles: I wonder if we might have a few moments' recess. I have some plans and specifications that I would like to show Mr. Wood.

Mr. Baucus: How long a recess do you want?

Mr. Galles: Five or ten minutes.

Mr. Wood: May I just say one more thing for the record, to complete the record from my standpoint?

Mr. Baucus: Yes, sir.

Mr. Wood: At this time the defendants move to strike from the record all of the testimony read to the record by Mr. [9] Galles, the agreement being only as to the character of proof, and move to strike same from the record upon the ground that it is irrelevant, and that no proper or sufficient foundation has been laid for the introduction of that evidence.

Mr. Baucus: That motion will be overruled. We will now have a 10-minute recess.

(Whereupon, at 10:50 a.m., the hearing recessed, and reconvened at 10:40 a.m.)

Mr. Baucus: This hearing will now recess until 2:00 o'clock this afternoon.

(Whereupon, the hearing recessed, and reconvened at 3:10 p.m. of the same day.)

Mr. Baucus: Are you ready to proceed, Mr. Galles?

Mr. Galles: During the recesses that we have had at the graciousness of the Master, we have been able to arrive at some agreements here as to what certain witnesses would testify to under oath and on the stand, and it is my understanding that with the written statements that have been prepared as a result of our conferences the Master can consider that those statements would be made as set forth in the written statements that are now being submitted.

Mr. Wood: Those statements can be turned over to the reporter to become a part of the record.

Mr. Galles: Yes, that is our course.

I have this one written statement, consisting of three pages, which should be marked as Stipulation No. I for identification purposes, which I now hand to the reporter. [10] There are certain amendments contained in the stipulation which it is requisite that the reporter in making a record of this observe,

that is the striking of certain portions, as well as the insertion of other portions.

(Stipulation No. I reads as follows:)

Counsel for plaintiff and counsel for defendants stipulate and agree:

A. That Rural Special Improvement District No. 73 was initiated by defendants' filing of a petition with the county commissioners of Yellowstone County, Montana, on September 18, 1946, and that thereafter on October 5, 1946, a resolution was adopted by said county commissioners creating Rural Special Improvement District No. 73 to include sanitary sewers, water mains, concrete curbs and gutters, and street paving; that following the creation of said Rural Special Improvement District, the contract was awarded to A. W. Hartwig Pipe Line Construction Company, the lowest and best of three bidders, on November 6, 1946; and that prior to the date of sale of each of the houses as set forth in Exhibit A of the Amended Complaint the sewer and water lines of said Rural Special Improvement District were installed and completed; that the concrete curbs, gutters and street paving of said Rural Special Improvement District No. 73 were completed in some instances prior to the date of sale as set forth in Exhibit A of the Amended Complaint, and that in the case of other houses in connection with which these latter improvements were completed after the date of sale set forth in said Exhibit A, the purchasers of these houses would testify under [11] oath and on the witness

stand that defendant A. W. Hartwig represented to them that the curbs, gutters and street paving would be completed; that the resolution of the county commissioners levying the tax upon the property within Rural Special Improvement District No. 73 was adopted October 15, 1947, and the resolution of final adoption was on October 23, 1947; that all of the work in connection with said Rural Special Improvement District was completed on or before June 30, 1947; and that defendants A. W. Hartwig and Jeff Tingle were the sole owners of the property within the Rural Special Improvement District No. 73 from the filing of the petition to create said Rural Special Improvement District until the sales to the various owners set forth in Exhibit A of the Amended Complaint.

B. That one Harry O. Duell, the Director of the Federal Housing Administration for Montana, would testify under oath and on the witness stand that as part of the official files and records of his office of which he is the custodian are the following: Description of Materials, Form No. 2005, executed by defendants, A. W. Hartwig and Jeff Tingle, on June 15, 1946, and received from said defendants on June 16, 1946, which said form is marked for identification as Exhibit No. 3; and that Narrative Specifications duly executed by defendant A. W. Hartwig on June 4, 1946, likewise a part of the official files and records of his office of which he is custodian, having been received on June 5, 1946, which Narrative Specifications are marked for identification as Exhibit No. 4; that [12] architectural plans were likewise received in his office from

defendants, A. W. Hartwig and Jeff Tingle, which are a part of the official files and records of his office of which he is custodian, which plans are marked for identification as Exhibits Nos. 5-12, inclusive.

C. That W. H. Riggs, under oath and on the witness stand, would testify that in July of 1948, he was employed as a field agent for the Office of Housing Expediter and was at that time experienced in reading plans and specifications for the construction of dwellings; that during July of 1948, he made a personal and detailed inspection of each of the houses designated in Exhibit A of the Amended Complaint as to "Construction Defects and Omissions" and that he found deviations between the plans and specifications submitted to the Federal Housing Administration (Exhibits Nos. 5-13, inclusive), and the houses as finally constructed based upon such personal and detailed inspection of each house described, such deviations being set forth in said Exhibit A of the Amended Complaint.

D. That S. L. Berg, under oath and on the witness stand, would testify that in April and May of 1948, he was a licensed architect and employed as such by the Federal Housing Administration at Helena, Montana, and that during said April and May of 1948, he made a personal and detailed inspection of each of the 24 houses listed in Exhibit A of the Amended Complaint, and that the items listed in Exhibit A of said Amended Complaint as "Construction Defects and Omissions" were [13] found by him to be the deviations between the plans

and specifications, being Exhibits Nos. 5-13, inclusive, herein, and the houses as they existed at the time of his inspection.

E. That Edwin C. Osness, under oath and on the witness stand, would testify that in May of 1949, he was a duly licensed architect and experienced in values in connection with home construction at that time, and that he was engaged in the private practice of his profession in Billings, Montana; that in the spring of 1949 he was employed by the Department of Justice to make an inspection of the "Construction Defects and Omissions" as alleged in the Amended Complaint in Exhibit A thereof, and that pursuant to said employment he made a detailed inspection of the house identified on page 9 of Exhibit A of the Amended Complaint as being 116 Arden, Lot 15, Block 2, and that he made personal inspection of the other houses listed in Exhibit A of the Amended Complaint for the purpose of determining the "Construction Defects and Omissions" between the plans and specifications heretofore marked Exhibits Nos. 5-13, inclusive, and the houses as they existed when he made his inspection; that, being familiar with the costs of construction in the years 1947 and 1949, the years involved herein, he arrived at the figures set forth in what is now marked Exhibit No. 14, which was personally prepared by him, and of which this is a true copy, and which he knows of his own knowledge to be true and correct, which figures are the same as set forth in Exhibit A of the Amended Complaint.

Mr. Galles: I now hand the reporter a similar document, which is the agreement between Mr. Wood and our office, [14] which is marked Stipulation No. II, for the same purpose, with similar deletions to be observed by the reporter in making the record.

(Stipulation No. II reads as follows.)

It is further stipulated and agreed that LeRoy D. Jensen, one of the original purchasers of one of the houses involved as described on page 10 of Exhibit A of the Amended Complaint, under oath and on the witness stand, would testify that in the office of A. W. Hartwig in Billings, Montana, and in the presence of Mrs. Jensen, as well as Mr. W. C. Jennings, defendant A. W. Hartwig during the course of negotiations for the sale and purchase of Lot 18 in Block 2, Calhoun Lane Subdivision, Billings, Montana, stated to Mr. Jensen that all special improvements were to be paid for by the builder.

It is further stipulated that the following named original purchasers under oath and on the witness stand would testify that defendant A. W. Hartwig represented to them personally that the special improvements were included in the sales price of $8,000.00: R. R. Bailey, Roy W. Hodge, R. B. McGinnis, F. J. Newman, Mrs. John H. Nickerson, Jimmie Scott and H. A. Walter.

Mr. Galles: In Stipulation No. I, certain exhibits are referred to by number, and at this time I would like to have these exhibits marked in ac-

cordance with those numbers for identification purposes.

I now hand to the reporter to be marked as Exhibit No. 3, Description of Materials, Form No. 2005. I now hand to the reporter to be marked as Exhibit No. 4, Narrative Specifications. I now hand to the reporter 9 architectural [15] plans, referred to in Stipulation No. I, to be marked as Exhibits Nos. 5 throught 13. both inclusive. It is requested that they be marked accordingly. And finally, what is entitled "Analysis of Relative Costs," consisting of two pages, which is to be marked as Exhibit No. 14, and referred to in Stipulation No. I as such.

For my first witness I'd like to call Harry O. Duell.

HARRY O. DUELL

having been first duly sworn, testified on behalf of the plaintiff as follows:

Direct Examination

By Mr. Galles:

Q. Will you state your name, please?

A. Harry O. Duell.

Q. It is Duell? A. Right.

Q. What is your present occupation?

A. Director of Federal Housing Administration here in Montana.

Mr. Wood: It is just a little hard to hear you, Mr. Duell.

A. Field Director for the Federal Housing Administration.

(Testimony of Harry O. Duell.)

Q. And that is for what area?

A. Montana.

Q. Where do you reside? A. Helena.

Q. You are the director at this time, is that right? A. Yes, sir.

Q. What are your duties generally, Mr. Duell?

A. My duties are—— [16]

Q. (Interrupting): Just summarize them, if you will, please.

A. It is administrative work, supervision of the insuring of loans for mortgages on properties that have been accepted by the Federal Housing Administration as being eligible for insurance.

Q. Among your duties do you have records in your office? A. Yes, sir.

Q. And are you the official custodian of the records in your office? A. Yes, sir.

Q. I hand you a group of papers that are clipped together, and ask you if they are connected with one another, or whether they were separated in your file at the time you brought them into the court room? A. It is two files.

Q. I wonder if you would separate those papers properly so as to show that they are not connected with one another directly.

A. These here were in one file. (Indicating a group of papers.)

Q. Will you please clip them together?

A. Yes. And these were in another. (Indicating the other group of papers.)

Q. Now, the papers that were in separate files I am now holding in my two hands, is that correct?

(Testimony of Harry O. Duell.)

A. Yes.

Mr. Galles: Would the reporter please mark the three papers I have handed to her as Exhibits 15, 16, and 17.

(The papers were so marked by the reporter.)

Q. I am now handing you back the three papers that you have [17] identified as being in one particular file. These papers are marked as Exhibits 15, 16, and 17. Would you state what those papers purport to be, not what they are, but what they purport to be?

A. The information submitted to the Federal Housing Administration on subdivisions.

Q. And under what conditions do you receive such a form on subdivision information?

A. I don't know just what you mean.

Q. Why would you receive that in your office?

A. As a starting point for the eligibility of properties.

Q. And when you say eligibility of properties, what do you mean, eligibility for what?

A. For insured loans for the Federal Housing Administration.

Q. The three exhibits you hold in your hand then, are they a part of your official files and records?

A. They were in our office, yes.

Q. Mr. Duell, who submitted plaintiff's Exhibit 15?

A. Well, it is signed by Hartwig & Tingle, by A. W. Hartwig.

(Testimony of Harry O. Duell.)

Q. And from that instrument can you tell when it was received in your office? A. No, sir.

Q. Is there a date on the application purporting to be the date it was prepared?

A. Well, presently we date-stamp everything coming into the office.

Q. Is the instrument dated by Mr. Hartwig, who prepared it?

A. The date submitted is May 18, 1946, on the form. [18]

Q. Can you tell whether or not Exhibits 16 and 17 were received in the office of the Federal Housing Administration in Helena at the time that Exhibit 15 was received? A. No, sir.

Mr. Wood: I didn't catch it. What did you say, sir? A. No, sir.

Mr. Wood: They were not, or you can't tell, which? A. I can't tell.

Q. Is it the usual course of practice, and is it the usual course of business in your office of the Federal Housing Administration in Helena that a subdivision plat, which is purported to be represented by Exhibits 16 and 17, is received with a subdivision information form, which is represented by Exhibit 15? A. Yes, sir.

Q. And I ask you again if these three exhibits, Nos. 15, 16, and 17, were, until you brought them into the court room, a part of your official files and records of the Federal Housing Administration in Helena? A. Yes, sir.

(Testimony of Harry O. Duell.)

Mr. Galles: We offer in evidence Exhibits 15, 16, and 17.

Mr. Wood: To which we object on the ground that they are irrelevant for any purpose, particularly upon the ground that the record already shows that as of May, 1946, there were proceedings under way with respect to special assessments on the Calhoun Lane properties, and that any representations made in that connection at that time are therefore irrelevant [19] in this inquiry.

Mr. Baucus: The exhibits will be admitted subject to your objection.

Mr. Galles: You may examine.

Cross-Examination

By Mr. Wood:

Q. As a matter of fact, Mr. Duell, these papers came to you from the Security Trust & Savings Bank, or can't you tell? A. I can't tell.

Q. They just sort of blew into your office and you found them there, is that right?

A. That's right. They were in the office when I took over the office.

Q. And you don't know then what was done with respect to them? A. I do not.

Q. And as far as you are concerned it is a dead file, isn't it? Very dead?

A. I don't know just how that should be answered.

Q. Well, at all events, let's state the question a

(Testimony of Harry O. Duell.)

little differently then. You are not doing anything about that application, are you?

A. No, sir.

Mr. Wood: That's all.

Redirect Examination

By Mr. Galles:

Q. Mr. Duell, you stated that at the time you took over your job as Director of the Federal Housing Administration, these exhibits were part of the file that was in your office? A. Yes, sir.

Q. And as such you treated it as an official record of your [20] office? A. Yes.

Q. And as such you are treating it as an official record of your office at this time? A. Correct.

Mr. Galles: I'm sorry, I overlooked something. This will be direct examination again.

Further Direct Examination

By Mr. Galles:

Q. I now hand you, Mr. Duell, what has been marked Exhibit No. 18, and ask you if you can state what that is?

A. That is the mortgagee's application for mortgage insurance.

Q. And is this particular exhibit, No. 18, an official record of your office? A. It is.

Q. Can you tell from the exhibit you hold and are looking at the date on which it was received in the F.H.A. office?

(Testimony of Harry O. Duell.)

A. The date-stamp indicates it was received June 6, 1946.

Q. By whom was that application submitted?

A. Well, it was submitted by the mortgagee.

Q. And who was that?

A. The Security Trust & Savings Bank.

Q. Do the names A. W. Hartwig and Jeff Tingle appear on this application, their signatures?

A. Yes, sir, as mortgagor and co-mortgagor.

Q. And who is then making the application for the mortgage insurance that you have stated this represents? What I am getting at, is it an application by the mortgagee, or is it a joint application by the mortgagor and the mortgagee, or [21] is it an application by the mortgagors only?

A. This is a different form than we are using now, if you will pardon me.

Q. I see.

A. But it is, as I would interpret this it would be an application by the mortgagor. I mean they are going to be the mortgagors in the case.

Q. And who are the mortgagors in connection with this particular exhibit?

A. Well, it is A. W. Hartwig, Verna B. Hartwig, and Jeff Tingle or J. Tingle, and Mercedes O. Tingle.

Q. Is the property upon which they are applying for mortgage insurance described in the exhibit you hold? A. Yes.

Q. What is the description of that property?

A. Lot 8, Block 2, Calhoun Lane Subdivision.

(Testimony of Harry O. Duell.)

Q. I believe you did state that this is part of the official files and records of the F.H.A. office in Helena, of which you are the director and legal custodian? A. Yes, sir.

Mr. Galles: We offer in evidence plaintiff's Exhibit No. 18.

Mr. Wood: To which we object also as wholly irrelevant for any purpose.

Mr. Baucus: Admitted, subject to the objection.

Mr. Galles: You may examine with reference to this matter.

Mr. Wood: No further examination. [22]

(Witness excused.)

Mr. Galles: I will call Ben S. Hill.

BEN S. HILL,

having been first duly sworn, testified on behalf of the plaintiff as follows:

Direct Examination

By Mr. Galles:

Q. State your name, please?

A. Ben S. Hill.

Q. And where do you reside?

A. In Bellevue, Washington, now. It is a suburb of Seattle.

Q. As I understand, you were a former director of the Federal Housing Administration for Montana? A. I was.

Q. Covering what dates?

(Testimony of Ben S. Hill.)

A. From June, 1937, to December, 1952.

Q. December of '52?

A. That's right.

Mr. Wood: Did you say June, '47?

A. June, '37. It was a 15-year period in there.

Mr. Wood: Thank you.

Q. You are somewhat familiar with the mortgage insurance that is connected with the Calhoun Lane Subdivision, are you not? A. Yes.

Q. Did you hear Mr. Duell testify that Exhibits 15, 16, and 17, which I am now showing you, were a part of the official records of the Federal Housing Administration in Helena?

A. That's right. [23]

Q. Were you the director and in charge of the office at the time that these three exhibits were received by the Federal Housing Administration in Helena? A. Yes, I was.

Q. And what was the purpose for the presentation or receipt of these three exhibits?

A. Well, to give information regarding the subdivision, how it would be developed, what it consisted of, or what they intended to build on there, and so forth.

Q. Is Exhibit 15 an official form of the Federal Housing Administration? A. That's right.

Q. And that is used in connection with the mortgage insurance program of which you had charge as part of your duties?

A. It was used at that time, that's right. It may

(Testimony of Ben S. Hill.)

have been changed since, but it was used at that time, that's right.

Q. And it was the official form at the time you used it? A. That's right.

Q. Can you tell me when the exhibits you hold were received in your office?

A. There is no stamp on Exhibit 15. There are no stamps on any of these exhibits. I couldn't tell the exact date they were received at.

Q. Do you have an independent recollection that these three exhibits were received in the office of the Federal Housing Administration in Helena?

A. Well, yes. That is I don't recall that these particular forms were, but they are a part of the official record and [24] I know that we had such forms at that time.

Q. Did you write any letters or do anything of an official nature in connection with the particular exhibits which you hold in your hand?

A. We probably did.

Q. You have no recollection of writing such a letter? A. Not on this.

Q. Perhaps if I were to show you this letter it would refresh your recollection. I am handing you a letter which purports to have your signature on it, and I will ask you if you can identify it as a letter which you wrote?

A. Yes, that is my signature. That is my letter, that's right.

Q. And I would like to call your attention to page 2 of this letter, about half way down, and see

(Testimony of Ben S. Hill.)

if the statements made therein refer to the exhibit that you hold in your hand, being Exhibit No. 15?

A. Yes, that's right.

Q. So that you can identify Exhibit 15 as having been in the office at the time you wrote the letter?

A. That's right.

Q. Incidentally, what date is that letter?

A. This letter is dated February 5, 1948.

Q. Does the date of the subdivision form appear in that letter?

A. Yes, the subdivision form is dated May 18, 1946.

Q. I now hand you what is marked Exhibit No. 18, which Mr. Duell identified as being an official record of the F.H.A. office. You heard him testify to that, did you not? [25] A. Yes.

Q. And were you likewise the director of the F.H.A. office in Helena at the time Exhibit 18 was received in that office? A. I was.

Q. And is there an identifying mark on this particular exhibit that informs you that it was received on a particular date? A. Yes.

Q. What date is shown?

A. June 6, 1946.

Q. Would you state what is the purpose for which this application or this instrument is received in the office of the F.H.A.?

A. It is the application of the mortgagee, the Security Trust & Savings Bank of Billings, Montana, for insurance on a particular piece of property that is described on an attached form.

(Testimony of Ben S. Hill.)

Q. And when that is received what is the usual course of practice, and what was done by the F.H.A. office in connection with this particular application?

A. Well, there were probably some accompanying forms in connection with this. The F.H.A. would want to know, of course, where these houses had been built, or where they were in process of construction, or whether it was proposed construction, or just what.

Q. I hand you a file and ask you if that will help you to testify as to what was received and what was done in connection with that application? [26]

A. The procedure would be to make an inspection of the site on which this building had been constructed or was to be constructed.

Q. And was that inspection made in this particular case?

A. I am trying to get the sequence here of these inspections. Here is one dated January 3, 1947.

Q. Now, what is that?

A. That is a compliance inspection, shown here as the second compliance inspection.

Q. And does that reveal—correct me if I am wrong—as I understand, one of the inspectors came down and inspected the premises?

A. That's right.

Q. And made his report?

A. That's right.

Mr. Galles: And I believe that is what Mr.

(Testimony of Ben S. Hill.)

Wood has referred to in his statement. You wouldn't know, but I think that's correct.

Q. After inspections were made, was a commitment for the insurance of the loan described in Exhibit 18 issued by the F.H.A. office?

A. Here is a commitment in favor of the Security Trust & Savings Bank, Billings, Montana, dated June 26, 1946, and to become null and void after February 26, 1947.

Q. Does it show who the mortgagors would be on that loan?

A. A. W. Hartwig and Verna B. Hartwig, and Jeff Tingle and Mercedes O. Tingle.

Q. Is the legal description of the property in connection with [27] that commitment given?

A. Lot 18, Block 2. Bruce Avenue, Billings, Montana.

Q. Were there any further commitments or official action taken in connection with the application?

A. This copy of commitment that I just mentioned shows "Cancelled" as of November 7, 1946, and a new commitment issued to the same mortgagee by the same mortgagors, dated November 7, 1946, and to become null and void after February 26, 1947.

Q. And that is for the same property but for a different amount?

A. A different amount, yes.

Q. Then what happened, according to the file?

A. Well, here is still another commitment that

(Testimony of Ben S. Hill.)

was issued for a slightly higher amount, dated March 14, 1947, and to become null and void after June 26, 1947.

Q. And was that commitment the final commitment?

A. There is still another one in here. Evidently meanwhile the property had been sold, and the commitment which I have before me now is in favor of Security Trust & Savings Bank, Billings, Montana, and bears date May 28, 1947, to become null and void after June 26, 1947, and showing the mortgagors as Leonard O. and Regina T. Apps.

Q. Mr. Hill, am I correct in my understanding that the commitments, the several commitments that were issued in favor of the Security Trust & Savings Bank, with Messrs. Hartwig and Tingle as the mortgagors, were in effect until the last commitment was issued with Mr. and Mrs. Apps as the [28] mortgagors? Is that a fair statement?

A. The cancellations of the old commitments are the same as the new dates. Now, here is a cancellation of the third commitment, I think, to which I referred, as of May 28, 1947, and this new commitment, which I believe is the fourth, was issued on the same date, May 28, 1947, with the new mortgagors, Leonard O. and Regina T. Apps.

Q. Your records show then, do they not, whether or not the mortgage was issued in connection with either the Hartwigs and Tingles or the Apps being the mortgagors, and the Security Trust & Savings Bank being the mortgagee?

(Testimony of Ben S. Hill.)

A. As to whether or not the mortgage was insured?

Q. Whether or not there was an actual mortgage given by some mortgagors to the Security Trust & Savings Bank as mortgagees?

A. Yes. Here is evidence of it here.

Q. And what mortgagors received the mortgage, or gave the mortgage, rather?

A. Leonard O. and Regina T. Apps.

Q. Does that appear to be the same property upon which the application was made and the prior commitments so issued in favor of Messrs. Hartwig and Tingle? A. Yes.

Mr. Galles: You may examine.

Mr. Wood: No examination, but now at this time I will move to strike from the record all of the testimony of the witness, because it appears now for the first time that it is wholly irrelevant for any purpose in this action. [29]

Mr. Baucus: Overruled, subject to your exception.

(Witness excused.)

LeROY D. JENSEN

having been first duly sworn, testified on behalf of the plaintiff as follows:

Direct Examination

By Mr. Galles:

Q. Will you state your name, please?

A. LeRoy D. Jensen.

(Testimony of LeRoy D. Jensen.)

Q. Where do you live, Mr. Jensen?

A. At the present time, 1119 Pepper Lane.

Q. Where did you formerly live?

A. 110 Arden Avenue, Calhoun Lane Subdivision.

Q. Generally, where is Calhoun Lane Subdivision?

A. Well, sir, it's in the southwest portion of Billings, through the west underpass, about two blocks south.

Q. It is not in the city limits?

A. No, sir.

Q. And it wasn't in the city limits when you lived there? A. No, sir.

Q. When did you move from there?

A. From there?

Q. Yes.

A. Oh, about the 28th day of June of '54. I don't remember exactly.

Q. Did you own property in Calhoun Lane Subdivision?

A. Yes, sir, I owned 110 Arden Avenue.

Q. I hand you what is marked plaintiff's Exhibit No. 19, and ask you if you identify it? [30]

A. Yes, sir. It's my real estate sales contract with Hartwig & Tingle.

Q. Sales contract of what property?

A. Of Lot 18, of Block 2, of Calhoun Lane Subdivision, Billings, Montana, with all improvements.

Q. When did you enter into that contract?

A. This contract is dated December 27, 1946.

(Testimony of LeRoy D. Jensen.)

Q. Your signature appears on there?

A. My signature, my wife's signature, Hartwig & Tingle, by A. W. Hartwig, and two witnesses, Doris M. McGinnis and W. C. Jennings.

Mr. Galles: I offer Exhibit No. 19 in evidence for the purpose of showing the property with the improvements having been contracted for between the defendants and this witness, connected with property involved in this lawsuit.

Mr. Wood: Objected to, if the Master please, as wholly irrelevant for any purpose, and as not having any reference at all to the matter in controversy here.

Mr. Baucus: It will be admitted subject to your objection.

Q. Mr. Jensen, do you remember when you moved into the property you purchased under the contract that you have just identified?

A. On or about January 7, 1947. I won't say the exact date, because I don't know.

Q. At that time do you recall whether or not any of the special improvements were installed and completed? [31]

A. To my knowledge they were all in. Just a minute. I don't believe the streets were completed yet.

Q. I want to call your attention to the fact that this special improvement district included water mains, sanitary sewer, concrete curbs and gutters, and street paving. Now, of those items, can you state which ones were completed?

(Testimony of LeRoy D. Jensen.)

A. I don't believe the gutters, curbs and gutters or the street paving was in when I moved in. I am sure it wasn't. It was in the winter time, and they couldn't pour concrete at that time.

Q. How about the water mains and the sanitary sewer? A. They were all in.

Q. And you were using those facilities at the time you moved into your house? A. Right.

Q. Did you pay the special assessments that were charged on the Rural Special Improvement District No. 73?

Mr. Wood: That is objected to for the reason that we have covered that entirely by our stipulation earlier showing who paid the assessments.

Mr. Galles: I will withdraw it. I'm sorry.

You may examine, Mr. Wood.

Mr. Wood: No examination.

Mr. Galles: That's all.

Mr. Jensen: Thank you.

(Witness excused.)

Mr. Galles: I wonder if I might have a minute or [32] two to review my file. I think I am about at the end of the government's case.

Mr. Baucus: Let's take ten minutes.

(Whereupon, at 4:00 p.m., the hearing recessed briefly.)

Mr. Baucus: Are you ready to proceed, Mr. Galles?

Mr. Galles: I might state for the record that as far as I can see, the Government rests its case on the evidence that is required to be heard in this matter by the Master, namely, the amounts of the overcharges, as Item 1, and the value of the construction defects and omissions. As to those items the Government rests the case.

Mr. Wood: Then, with the understanding we have, we can adjourn until 10:00 o'clock tomorrow?

Mr. Baucus: Yes, we will adjourn until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:15 p.m., the hearing in the above-entitled matter adjourned until Tuesday, January 18, 1955, at 10:00 a.m.

Tuesday, January 18, 1955

(The hearing in the above-entitled matter continued, pursuant to adjournment from January 17, 1955, at 10 a.m.)

Mr. Baucus: Are you ready to proceed?

Mr. Wood: As I understand, you have now presented the case for the United States in the way of direct testimony, [33] is that correct, Mr. Galles?

Mr. Galles: That's correct.

Mr. Wood: As the Master knows, Mr. Galles and I have also made a further stipulation for the purpose of saving unnecessary detailed proof, and I am now going to read that stipulation, for a double purpose. I would like to have the Master under-

stand just what the proposals are, and then I am going to predicate a motion on what I read.

(The stipulation presented by Mr. Wood reads as follows.)

It is hereby stipulated that the witness, H. L. White, on the stand and duly sworn, will testify as follows, to wit:

That he is an officer of the Security Trust and Savings Bank of Billings, Montana, and was an officer thereof in 1946 and 1947;

That in the main the said bank has acted as an agent in relations between the Federal Housing Administration and Messrs. Hartwig & Tingle in connection with the so-called Calhoun Lane Subdivision operation, and that he, the said H. L. White, as an officer of the said bank, and in July, 1946, received from one S. L. Berg, Chief Underwriter, at Helena, Montana, of the Federal Housing Administration of the United States, one set each of No. 1 and No. 1a House Plans for the said Calhoun Lane Subdivision operation, together with one copy of FHA form No. 2005, Description of Materials, for delivery to Messrs. Hartwig & Tingle to be used on the job by them during the construction of the houses in Calhoun Lane Subdivision, and that he delivered these documents to Messrs. Hartwig & Tingle early in July, 1946. [34]

That the said bank, acting through himself as officer thereof, received from the Federal Housing Administration certain Compliance Inspection reports with respect to the property involved in the Federal Housing Administration transaction with

Messrs. Hartwig & Tingle in the said Calhoun Lane Subdivision, which reports covered each and all of the lots in the said Federal Housing Administration transaction with Messrs. Hartwig & Tingle, and that a photostatic copy of one of such reports, which is identical with all the other reports then received, is presented herewith;

That, acting upon the strength of such Compliance Inspection Reports as aforesaid, the said bank, acting through himself as an officer, then released, and in October, 1947, to Messrs. Hartwig & Tingle moneys held by the said bank as mortgagee for the property owners involved in the said Calhoun Lane Subdivision operations, being part of moneys borrowed by the said property owners as mortgagors from the said bank to pay to Messrs. Hartwig & Tingle the $8,000 consideration per lot fixed as the purchase price thereof for lots in the said subdivision; and that there is also presented herewith a certified copy of a deed of conveyance covering one of the said lots, which deed of conveyance is identical with the other deeds delivered for property in the said subdivision save only as to the date thereof and the real estate involved, and that all of the said lots in the said subdivision were conveyed under the same form of deed aforesaid;

That also prior to the delivery in the fall of 1947 of the aforesaid Compliance Inspection reports, there were [35] delivered to the bank and to him as agent as aforesaid other Compliance Inspection Reports covering the construction work on the lots in the said Calhoun Lane Subdivision, one set bear-

ing date of January 27th, 1947, and the other set bearing date of March 29, 1947, these reports being identical for all of the lots involved, and that a true and correct copy of each of said reports save only as to the lot description, being photostatic copies thereof, are tendered herewith, and that during the progress of the construction work in the said Calhoun Lane Subdivision operation no other Compliance Inspection Reports were delivered to the said bank or to him as an officer thereof, that is, no Compliance Inspection Reports other than those referred to previously in this stipulation.

Mr. Wood (Continuing): Now then, in connection with that stipulation which has been read into the record, we ask to have these documents mentioned in the stipulation marked as Exhibits 20, 21 and 22, respectively.

Now, if the Master please, with this matter in the record, and basing this motion primarily upon Exhibit No. 20——

Mr. Baucus (Interrupting): Which is Exhibit 20, Mr. Wood?

Mr. Wood: I will show it to you in just a minute. That is the compliance inspection report which bears date October 23, 1947.

(Continuing with motion): The defendants move to strike from the record upon the ground that the matter sought to be stricken is at variance with the adjudication made in Exhibit No. 20, paragraphs marked D and E, as well as F, in the [36] first stipulation as to facts to which Mr. Galles,

representing the plaintiff, and I have heretofore agreed.

I further move to strike from the record as both incompetent and irrelevant all of the testimony, and likewise as stipulated to the record by Mr. Galles, with respect to the special assessments levied and paid, or still unpaid, as the case may be, and this is upon the ground that the record shows without any dispute that the liens for the special assessments involved do not attach until long after all of the lots have been sold, all of the lots in Calhoun Lane Subdivision have been sold that are involved in this controversy, and have been sold under the form of deed which is marked Exhibit No. 22.

The Master knows this is dictated for the record, and I don't expect necessarily a ruling, and I doubt if the Master would have power to make a ruling, but I am making it at least for the record.

Mr. Baucus: Yes, sir.

Mr. Wood: I would like to say, too, in connection with the first motion and for the record that Exhibit No. 20, which is in evidence under the stipulation that I have dictated, is the compliance inspection report bearing date of October 23, 1947, prior to the claimed inspection made by Messrs. Riggs and Berg in the stipulation which I agreed to with Mr. Galles, and that that compliance inspection report certifies specifically building improvements acceptably completed. It contains a further certification as follows: "I certify that I have carefully inspected this property on this date; and that I have reported all substantial variations from the

approved [37] drawings and Description of Materials, specific conditions of the commitment and applicable requirements * * *." It was signed by H. A. Viken, as I read the name, Construction Examiner. It is approved by L. O. Bradford, Acting Chief Architect. It was also approved by S. L. Berg, who is shown to be Chief Underwriter. It bears the statement: "Compliance. Firm Commitment. Closing papers may be submitted."

We take the position, for the purposes of the record, that that is an adjudication of complete performance insofar as the buildings involved are concerned, and therefore it disposes of claims that there have been so-called construction defects and omissions.

Furthermore, I want to say for the record that with respect to Exhibit No. 20, it is a warranty deed, and that it and all of the other deeds were delivered long prior to the time when the special assessments involved in this controversy became liens as such, and that at the time of the sale of the lots involved, as appeared from the record, none of the lands involved and sold in this Calhoun Lane Subdivision transaction was charged with any lien whatsoever for any special assessment, and that there is nothing in the warranty deed that obligates the grantors, who are the defendants in this action, and their wives, to take care of any obligations other than those previously existing, or at the time of the execution and delivery of the deed or deeds.

Furthermore, I call attention for the purpose of

the record to the fact that the consideration for each of these [38] deeds is shown upon the face of this deed to be the sum of $8,000, which the grantors, Hartwig and Tingle and their wives, acknowledge they have received, and that that consideration is shown to have been the consideration, in that, while only $1.00 is expressed as consideration, nevertheless, on the face of the deed it is shown that $8.80 in U. S. documentary revenue stamps were attached and cancelled, thus establishing that the real consideration, apart from the expressed consideration, was $8,000.

Now, in order that there may be no question, although I think that these exhibits went into evidence under the stipulation, we offer them in evidence.

Mr. Galles: No objection as far as the Government is concerned.

Mr. Wood: That is all that I am going to dictate in connection with those motions.

Mr. Galles: I would like to dictate into the record resistance to Mr. Wood's motions to strike certain portions of the evidence heretofore taken and stipulated to as what would have been testified to by various witnesses, on the ground that, in the first place, the compliance inspection reports which have been marked Exhibits 20 and 21 having been signed in the first instance by H. A. Viken—I think Mr. Wood inadvertently read his title as Construction Examiner, whereas it is in fact checked as Valuator—Staff.

Mr. Wood: Well, perhaps I did.

Mr. Galles: I know that was inadvertent.

With further reference to the compliance inspection [39] reports identified as Exhibits 20 and 21, I would like to call the attention of the Master and for the record to the fact that Judge Pray in his order filed July 30, 1951, in this cause, held that if any officer or agent of the Government had authority to make a settlement alleged as a defense interposed by the defendants it was not made in the due performance of his duty or within the scope of his authority when it appears it was made in violation of the law and of the covenant with the Government which provided that there should be no inequality in the sale and maximum price of the land and improvements. In other words, it is the contention of the Government that H. A. Viken, L. O. Bradford and S. L. Berg, whose names appear on the compliance inspection reports, had no authority to bind the Government in releasing these defendants of the obligation they had to follow the plans and specifications heretofore identified and in evidence in the construction of the houses in the Calhoun Lane Subdivision.

It is further the contention of the Government that the motion to strike should be denied so far as it pertains to the Rural Special Improvement District No. 73 assessments, on the grounds that there is in evidence written representation of intention of these defendants that the special improvement district assessments should not be charged to or paid by the purchasers, and in Stipulation No. 11, entered into yesterday and handed to the reporter for the record, it was stipulated that certain witnesses

would testify that oral representations were made that the builder, namely, the defendants in this case, would pay for the special improvement district assessments, and [40] that the purchasers would not be required to pay.

I think it is further in the record that the Special Improvement District No. 73 was commenced by these defendants in September of 1946 by the filing of a petition, and that on October 5, 1946, a resolution creating the district was adopted, although Mr. Wood is correct in stating that the resolution levying the tax was not adopted until October, 1947.

Mr. Baucus: Do you have anything further to say, Mr. Wood?

Mr. Wood: Yes, I do. Is there anything more that you want to hear discussed?

Mr. Baucus: No, but I do believe that I should make a ruling for the record, so that, if I am in error, it will be clear what my position is.

Mr. Wood: That is entirely up to you.

Mr. Baucus: Yes, I think it would be better to make a ruling, so I will overrule your objection.

Mr. Galles: And motions to strike?

Mr. Baucus: Yes, and motion to strike.

Mr. Wood: There are two motions to strike. All the motions to strike are overruled, I suppose?

Mr. Baucus: Yes.

(The following evidence was thereupon presented on behalf of the defendants.)

A. W. HARTWIG

having been first duly sworn, testified on behalf of the defendants as follows: [41]

Direct Examination

By Mr. Wood:

Q. Will you state your name, please?

A. Hartwig.

Q. Your initials? A. A. W.

Q. Where do you live, Mr. Hartwig?

A. In Billings.

Q. Are you one of the defendants in this lawsuit? A. I am.

Q. How long have you lived in Billings?

A. 11 years.

Q. You have lived in Montana longer than that, have you? A. No.

Q. And what is your occupation or business or profession? A. Contractor.

Q. And as such you entered into this arrangement with the F.H.A. involving the Calhoun Lane Subdivision, did you not? A. I did.

Q. Now, as a matter of fact, in the handling of this Calhoun Lane Subdivision transaction with the people who purchased the lots involved, did you handle the details yourself, either individually or through your office? A. No.

Q. As a matter of fact, everything was handled through the Security Trust & Savings Bank, wasn't it? A. That's correct.

Q. And what was done about the deeds, did you,

(Testimony of A. W. Hartwig.)

in each instance, [42] deal with the purchasers or not? A. No; that was done by the bank.

Q. And what about the deeds, were they prepared in advance, or in blank, or what?

A. In blank.

Q. In other words, you and Mr. Tingle and your respective wives signed these documents and they were left with the bank to conclude the deals with the purchasers? A. That s correct.

Q. And that is the way everything was carried on in this Calhoun Lane Subdivision transaction?

A. Yes, sir.

Q. Did you have any personal contacts with these purchasers? A. A few, yes.

Q. Well, did you in connection with the closing of the transactions? A. No.

Q. The bank, I take it, of course, was authorized to deliver these deeds and fill them in when the deals were concluded? A. That's correct.

Q. And that is where Mr. White comes into this picture, is it? A. Yes, sir.

Q. These compliance inspection reports that were put in evidence went to Mr. White, or to the bank, did they not? A. Yes.

Q. And that is why he handled them, that is as testified in this lawsuit? A. Yes. [43]

Q. Now, with respect to this, or these so-called special assessments, what did you have to do with the creation of the special improvement district involved that brought about the levy of assessments? What did you have to do with the creation of it?

(Testimony of A. W. Hartwig.)

A. We asked the county board to make a survey, because these utilities would be necessary in the future.

Q. And what prompted you to make this application and bring about the making of levies later for these utilities? In other words, why did you do it?

A. Well, it was necessary to have paving out there. It was necessary to have sewerage, and——

Q. (Interrupting): Well, let me ask you, before you answer any more, let me ask you these further questions. You, of course, have gone over all of the papers that you received from the F.H.A., haven't you? A. Yes.

Q. And understood them as a contractor?

A. Yes, sir.

Q. Did you find anything whatever in those papers so far as your examination went that provided for special assessments or for the levy of charges of that character that obligated you in that connection? I ask you, have you found anything?

A. No, I didn't.

Q. Then you did so on your own hook, if I may use a slang phrase, is that right? [44]

A. Yes.

Q. And I take it that you did it because you felt that ultimately the property owners out there would have to do something about it themselves if you didn't? A. That's correct.

Q. Now, in May and June, 1946, had you conceived that idea then with respect to having special

(Testimony of A. W. Hartwig.)

assessments levied? I am talking about May and June, 1946.

A. I don't quite understand, Mr. Wood.

Q. All right. When did you conceive the idea about having a special improvement district created? A. About the middle of '46.

Q. Well, when you say the middle of '46, what do you mean?

A. About June, somewhere along in there, May or June.

Q. Well, put it this way: You have heard the testimony of Mr. Duell and of Mr. Hill with respect to a transaction that went through the bank, haven't you? A. Yes, I did.

Q. At that time had you conceived the idea of doing anything about special assessments?

A. No, we hadn't.

Q. That is what I wanted to get at. In other words, then, it was after that time, was it?

A. Yes.

Q. So that that transaction was carried through before you conceived the idea or anything had been done? A. That's right.

Q. And, as a matter of fact, I am correct, am I not, and perhaps [45] that is the effect of the testimony of these gentlemen, that nothing was ever done in connection with that particular transaction by Hartwig and Tingle, that is the one referred to by these gentlemen in their testimony?

A. That's right.

Q. Now, you heard Mr. Jensen testify with re-

(Testimony of A. W. Hartwig.)

spect to some contract that was made, didn't you?

A. Yes.

Q. Did you have anything to do with drawing that contract? A. No, I didn't.

Q. And that probably went through the bank the same way?

A. That probably was drawn in our office, yes, but I didn't draw it.

Q. You didn't have anything to do with it?

A. No.

Q. Now, another matter I would like to get straightened out on the record and in my own mind as well: Did you have any dealings at all with the F.H.A., either at the time this entire arrangement was commenced, or later, with respect to the improvements and the special assessments in connection therewith? A. No.

Q. Did the F.H.A., to your knowledge know anything about the creation of this district and the making, the providing of these facilities?

A. I am sure they did.

Q. Why do you say that? What do you base that on? [46]

A. Well, they were making constant inspections of the buildings out there, and they knew that the work was going on.

Q. They never discussed with you these special assessments that were to be levied, did they?

A. Never anybody connected with the F.H.A., no.

Q. Or anybody else? A. No.

Q. Now, you have seen, I suppose, in fact I

(Testimony of A. W. Hartwig.)

know you have, the stipulation that Mr. Galles and I agreed to, which provides in part, to cover only part of it now, that in your office and in the presence of Mrs. Jensen as well as Mr. Jennings, you, during the course of negotiations for the sale and purchase of one of the lots in Calhoun Lane Subdivision, stated to Mr. Jensen that all special improvements were to be paid for by the builder. Do you remember that? That was the stipulation, I mean, that was made? A. No.

Q. Well, you remember that we made that stipulation? A. That's right.

Q. What I am asking you now on top of that is, will you please tell the Master whether that is a correct statement or not?

A. That is false.

Q. In other words, you are telling the Master and telling me that you never made any such statement to Mr. Jensen? A. That's correct.

Q. As a matter of fact, did you have any conversations with Mr. Jensen about the facilities that were to be provided [47] in this special improvement district? Do you remember whether you did or didn't? A. I don't recall that I did.

Q. Would you say that you did not?

A. I would say that I did not.

Q. Then certainly you virtually refute his statement that has been dictated to the record, do you?

A. Yes.

Q. Now, then, furthermore it is set forth in that same stipulation that the following-named original

(Testimony of A. W. Hartwig.)

purchasers would testify that you represented to them personally that the special improvements were included in the sale price of $8,000, and then the persons named are R. R. Bailey, Roy W. Hodge, R. B. McGinnis, F. J. Newman, Mrs. John H. Nickerson, Jimmie Scott and H. A. Walter. You remember that was dictated to the record, don't you?

A. Yes.

Q. And, in other words, they say that you told them that the special improvements were included in the sale price of $8,000?

A. That I declare is false, a false statement.

Q. In other words, you did not make any statement to any one of those persons?

A. I did not.

Q. Do you remember having any conversations with them on that subject, or with any of them?

A. Not that I recall, no.

Q. Well, you would recall it if you had, wouldn't you? [48] A. Yes.

Q. Which is equivalent to saying that you did not have any such conversation?

A. That's right.

Q. Do you remember discussing with them the matter of these special taxes that would be levied for these facilities, or with any of them?

A. I can't say that I do.

Q. Now, of course, you knew about this compliance inspection report, dated October 23, 1947, did you not? A. Yes.

(Testimony of A. W. Hartwig.)

Q. And did you see it shortly after the bank got it? A. I believe I did.

Q. And you are familiar with its contents?

A. I am.

Q. As a result of that compliance inspection report, what did you get from the bank ultimately?

A. A final settlement.

Q. And when you say final settlement, you mean the rest of the $8,000, do you not?

A. That's correct.

Q. On each of the loans involved?

A. That's right.

Q. Did you ever hear anything about these subsequent inspections that Mr. Berg and somebody else whose name I have forgotten are supposed to have made in 1948? A. No. [49]

Q. Never heard anything about them?

A. No.

Q. Nobody ever reported them to you?

A. No, sir.

Q. Has anybody ever written any complaint to you after this final inspection report, Exhibit No. 20? A. No, sir.

Q. Nobody connected with the Government at all? A. No, sir.

Q. When did you first hear about the claims of the Government in this connection?

A. I believe it was October, '47.

Q. Not '47. I am talking about the claims of the Government. A. Oh, some time in '48.

Q. In other words, it was when this lawsuit was

(Testimony of A. W. Hartwig.)

brought, wasn't it? A. That's right.

Q. And prior to that time they made no demands upon you at all? A. No, sir.

Q. Either to pay these special assessments or to take care of alleged defects or omissions, am I right? A. That's right.

Mr. Wood: You may cross-examine.

Cross-Examination

By Mr. Galles:

Q. Mr. Hartwig, referring to this last portion of your testimony, about the claims of the Government, you are referring to the deficiencies or deviations between the plans and [50] specifications and the construction, you say that you never heard anything about them from any agent of the Government until the lawsuit was brought?

A. That's correct.

Q. That's right? A. That's right.

Q. Nobody called at your office to tell you that there were these deficiencies prior to the filing of the lawsuit? A. That's right.

Q. You are sure of that? You couldn't have forgotten? A. No, I am sure of that.

Q. Are you acquainted with Ben S. Hill?

A. Yes.

Q. Do you recall his being in your office some time in 1948 with reference to the Calhoun Lane Subdivision houses?

A. No; I don't think Mr. Hill was ever in my office.

(Testimony of A. W. Hartwig.)

Q. Could you have forgotten that he was there, and could he have been there talking with you without your remembering?

A. No. I would remember that, sir. Mr. Hill has never been in my office.

Q. And he has never discussed with you the deviations between the plans and specifications and the final construction of the houses?

A. During the construction of the homes there was inspection made, and if there were any deviations they were called to our attention, and they were corrected at that time. [51] There were three inspections, as I recall, the first, second and third, and possibly the fourth or final.

Q. That's correct, and those are the ones that are here in evidence? A. Yes.

Q. Referring to the top of page of Exhibit 21, it appears that A. L. Swanson made an inspection on January 27, 1947. That is one that you are referring to, is that correct? A. That's one, yes.

Q. And the second one is the second page of Exhibit 21, made by H. A. Viken on March 29, 1947? A. That's correct.

Q. And the third inspection that you are referring to is one made by the same man, H. A. Viken, on October 23, 1947? A. Correct.

Q. So it was either Mr. Viken or Mr. Swanson that made these inspections?

A. Here it relates that there are certain compliances, certain things that must be done here before that becomes effective.

(Testimony of A. W. Hartwig.)

Q. Yes, that appears on these exhibits, so that the Master can see what is on there?

A. Right.

Q. Well, my object in referring to those is to find out who told you about some of the deviations between the plans and the actual construction.

A. The inspectors.

Q. Which was one of these men?

A. That's right. [52]

Q. And not Mr. Hill?

A. No, not Mr. Hill. I might also call your attention to the fact that these inspection reports were not delivered to us directly.

Q. I understood that from your testimony.

A. They were given to the bank, and the bank called our attention to the deviations, if any.

Q. I believe you testified that you don't recall any conversation with Mr. Jensen or any of the other home owners that Mr. Wood read off to you from our Stipulation No. II that was offered yesterday. You don't remember any conversations with them with reference to the special improvement district assessments? A. No, I don't.

Q. Is it possible you could have had some with them and not remember it?

A. That might be. That might be.

Q. You were dealing with a lot of people, and when you say it might be, it could be that you had a conversation and have forgotten it now?

A. No. I wasn't dealing directly with these peo-

(Testimony of A. W. Hartwig.)

ple. Mr. Jennings, our office manager, dealt with all of them.

Q. But you did talk to some of the owners and prospective owners? A. Yes, I did. Yes, I did.

Q. This was during the early part of 1947, would you say? I believe the record shows all the houses were sold between January or February, 1947, and June 30, 1947, so it was during [53] the time that the houses were being sold that you discussed at least something with reference to the sale of the houses with these purchasers or prospective purchasers? A. A few of them, yes.

Q. Well, when you say the statements made with reference to the builder paying for the special improvement district assessments and that those assessments would be included in the $8,000 purchase price, when you say those statements on the part of the home owners and what they would testify to are false, do you say that because you don't recollect having talked to them about it; is that the reason for your saying it is false?

A. No, that isn't the reason. Because I never told anyone that that was part of their contract, because the special improvements were not. I had no reason to tell them that.

Q. Now, the contract that was offered in evidence, the contract for sale between your firm, that is, Hartwig & Tingle, and Mr. Jensen, states that it was with improvements, and I understood you to say that that contract was drawn in your office but that you had nothing to do with it, except, I

(Testimony of A. W. Hartwig.)

assume, signing your name? A. Yes.

Q. If that was drawn in your office, it was drawn by one of your employees? A. That's right.

Q. And your employees were assisting you in the sale of these houses, and doing other things under your direction? A. That's correct.

Q. Mr. Hartwig, with reference to special improvement district [54] assessments, and whether or not you intended to pay for them yourself, I am going to show you Exhibit 15, and refer your attention to what appears to be your signature. Is that your signature? A. It is.

Q. And then above your signature, under item 6, Utilities and Conveniences, I notice that the tract will be provided with electricity, gas, telephone, water supply from municipality, public utility, sewage disposal by private septic tanks, and under subsection b, Give description of contemplated street improvements and utilities, you have typed in "gravel and oil mix, water and gas being brought in"? A. Right.

Q. And also under that same item 6——

A. (Interrupting): It says, "being brought in."

Q. Right. Then also under item 6 appears the following: "What streets are dedicated to and maintained by municipal authorities," and the answer, "all streets." That is correctly stated there, isn't it?

A. By public authorities.

Q. By public authorities? A. Correct.

Q. Then, going on down to item 7, which is directly under item 6, Taxes and Special Assess-

(Testimony of A. W. Hartwig.)

ments, under that appears item b, "What special assessments will purchasers be required to pay," and the answer, "None." Is that correct, is that the answer? A. The answer is "none." [55]

Q. Then item c reads: "Are all contemplated street and utility improvements installed by developer and included in sale price," and the answer is what?

A. Yes. But that also states that there will be septic tanks used there.

Mr. Galles: Yes, I understand that.

Mr. Wood: What is that exhibit number?

Mr. Galles: Exhibit 15.

Q. Well, at a later date then you decided to put in a public sewer, is that a fair statement?

A. That's right.

Q. And it was some time in June, I believe you said it was, after this was filed?

A. That's right.

Q. Exhibit 15? A. That's right.

Q. And because you decided to put in a public sewer instead of septic tanks, as I understand it, you applied to the F.H.A. for an increase in the maximum sale price in order to cover the additional cost of providing sewers? A. No.

Q. You did apply to the F.H.A., did you not, for an increase in the sale price? A. I did.

Q. For what reason did you apply for that increase in the maximum sale price?

A. Because of the increase in cost of materials.

(Testimony of A. W. Hartwig.)

The heating systems were changed from a hot air system to radiant heat. [56]

Q. Any other grounds?

A. No, I think that is substantially all.

Q. There was the heating system, and the increased cost of doing business generally?

A. That's right.

Q. Would you say it was not because you were going to provide public sewer rather than septic tanks? A. No.

Q. Did you make that application or did one of your employees make it? A. I made that.

Q. Well, I don't mean to mislead you. I have a letter here signed by W. C. Jennings.

A. Yes.

Q. So that he wrote the letter?

A. That's right.

Q. But it was done at your direction?

A. Yes.

Q. Do you recognize Mr. Jennings' signature?

A. I do.

Q. As I understand it, he is now deceased?

A. Yes.

Q. I hand you what has been marked plaintiff's Exhibit No. 23, which purports to be a letter on A. W. Hartwig Pipe Line Construction stationery, consisting of two pages, and ask you if you recognize Mr. Jennings' signature on the second [57] page? A. I do. I do.

Q. And do you recall that he wrote that letter at your direction or request? A. Yes.

(Testimony of A. W. Hartwig.)

Mr. Galles: We offer in evidence Exhibit No. 23.

Mr. Wood: May I look at it?

Mr. Galles: Yes.

Mr. Wood: Objected to as immaterial and irrelevant for any purpose.

Mr. Galles: I might state that the probative value of that letter is not as important as the testing of the credibility and the recollection of this defendant as to certain facts and what transpired seven or eight years ago.

Mr. Baucus: Well, I think it is admissible, at least for the purpose for which you want it admitted, so it will be admitted.

Q. Following the application by you or someone in your office to the F.H.A. for an increase in the maximum sales price for these houses, such increases were allowed by the Federal Housing Administration, were they not? A. Yes.

Q. And, as I understand it, it started out at $6,000 as the maximum sale price, which is stated in that exhibit that you saw which referred to septic tanks, and was later increased $300 or $400, is that correct?

A. I can't remember that, those figures.

Q. Well, finally it was arrived at that $8,000 was the [58] maximum sale price set?

A. That's right.

Q. For the sale of each one of these houses in Calhoun Lane Subdivision? A. That's right.

Q. And it was following your application for increase that that $8,000 maximum sale price was

(Testimony of A. W. Hartwig.)

granted? A. That's right.

Q. Do you recall when the final maximum sale price was allowed?

A. No, I don't. I think the record will show that. I don't recall it.

Q. When you received the sale price for any of these houses, or all of them, you got it from the Security Bank and not from the individual purchaser, is that correct? A. That's right.

Q. And that amount was $8,000, in exchange for the deed, of which one of these exhibits is a typical photostatic copy? A. That's right.

Q. That $8,000 did not include the special improvement district assessment, is that correct?

A. That's correct.

Q. So that the purchasers and owners of the houses were obligated to that special improvement district, as far as you were concerned?

A. That's correct.

Q. And you didn't pay any of the special improvement district assessments? [59] A. No.

Mr. Galles: No further questions.

Redirect Examination

By Mr. Wood:

Q. Mr. Hartwig, Mr. Jennings was in your employ, I think you said? Mr. Jennings was in your employ? A. Yes.

Q. And he has since died? A. Yes.

Q. Now, was Mr. Jennings a lawyer?

(Testimony of A. W. Hartwig.)

A. No.

Q. Had no training as a lawyer? A. No.

Q. He was just an ordinary clerk in your office, wasn't he? A. Right.

Q. Had he had any experience in drawing contracts for the sale of real estate or anything of that sort? A. No.

Q. Now, at the time that it is charged that you had conversations with some of these purchasers, and you have repudiated what they had to say with respect to your express willingness to pay for the special improvements, did you know what the amounts of these special assessments were going to be? A. No. No, I didn't.

Q. As a matter of fact, if you had any talks with them at all regarding any of those matters, it must have been prior to the end of June, 1947, isn't that correct? [60] A. Yes, I would say so.

Q. And you know from the evidence in this record that it wasn't until the fall of 1947 that anybody could tell what the charges were going to be for the work that was done in that special improvement district, isn't that correct?

A. That's right.

Q. So that you never were in a position to discuss figures with any of these prospective buyers, were you? A. That's right.

Q. Now, you were examined about Exhibit No. 15, Mr. Hartwig. The date was not mentioned, but what is the date on there? A. May 18, 1946.

(Testimony of A. W. Hartwig.)

Q. At that time were there any special assessments in contemplation or that had been levied?

A. No.

Q. It hadn't even been given any consideration or thought, had it? A. No, sir.

Q. And there were no assessments against the properties at that time? A. No.

Mr. Wood: That's all.

Recross-Examination

By Mr. Galles:

Q. Just one or two questions with reference to the cost of installing the special improvements. As I understand it, according to the record, it was the water, the sewer, [61] the curbs and gutters, and street paving? A. Right.

Q. Your company or one of your other companies was awarded the contract on that in the fall of 1946? A. Right.

Q. So that you knew what the county had to pay, or the district had to pay your company for the installation of those improvements, you knew that because you had the contract?

A. That's right.

Q. And, therefore, based upon just some simple mathematics, you could have figured the approximate amount to be assessed against each lot out there?

A. No. There are other charges to be levied out there, too.

(Testimony of A. W. Hartwig.)

Q. But you knew it would be at least that much?

A. That's right.

Mr. Galles: That's all.

Mr. Wood: That's all, Mr. Hartwig.

(Witness excused.)

Would you like to continue, or take a recess?

Mr. Baucus: We will recess the hearing for ten minutes, if that is agreeable.

(Whereupon, at 11:05 a.m., the hearing recessed as above noted.)

Mr. Wood: Mr. Tingle, will you be sworn, [62] please?

JEFF TINGLE

having been first duly sworn, testified on behalf of the defendants as follows:

Direct Examination

By Mr. Wood:

Q. Will you state your name, please?

A. Jeff Tingle.

Q. Are you one of the defendants in this lawsuit? A. Yes, sir.

Q. Where do you live, Mr. Tingle?

A. In Billings.

Q. Have you lived here for some time?

A. 26 years.

Q. What is your business or profession?

A. I am with a retail lumber yard.

(Testimony of Jeff Tingle.)

Q. What experience, if any, have you had in construction work?

A. I have been associated with this lumber yard, and as side lines have constructed several houses other than this project.

Q. Would you say that you have had considerable experience in construction work?

A. I would say so, sir.

Q. You have been in the courtroom during the progress of this hearing before the Master, have you not? A. Yes, sir.

Q. And you remember that in order to save much of the detailed proof and the calling of witnesses it was stipulated by Mr. Galles for the Government that as to the construction [63] defects and omissions alleged to have taken place or to exist, the witnesses on the stand would testify that these items and figures set forth in connection with the amended complaint are in fact what they found to exist and what they believe the values are, or words to that effect, do you remember that?

A. Yes, sir.

Q. Now, who had charge of the construction work for Hartwig & Tingle on the Calhoun Lane Subdivision?

A. There was a foreman or superintendent in charge on the job.

Q. Well, who had the complete over-all charge?

A. I did.

Q. And did you exercise that supervision?

A. Yes, sir.

(Testimony of Jeff Tingle.)

Q. Now, will you please explain to the Master what, if any, so-called defects and omissions existed or exist in connection with the work that was done on that subdivision?

A. These so-called defects and omissions are really substitutions that were necessary.

Q. What you are telling me and the Master then is that it became necessary or advisable to make substitutions in the progress of the work, substitutions for items listed in the plans and specifications, is that right? A. Yes, sir.

Q. And what did the F.H.A. know, if anything, about these substitutions?

A. There are three or four inspections. You have to leave the [64] work open for these F.H.A. inspections before you take further progress, and there were no substitutions made without being approved by these inspectors, who were on the job at least with great regularity, because there would be three or four houses ready for certain inspections, and three or four others would be ready for another stage of inspection, so that they were there quite often.

Q. Let me ask this specific question: Did you omit anything in the construction of these houses without the consent and approval of the F.H.A. inspectors? A. No, sir.

Q. And were there any defects as such in the work that you did?

A. We were very proud of the work that was done out there, as to the quality of the work.

(Testimony of Jeff Tingle.)

Q. As a matter of fact, your attention has been called to that exhibit, I have forgotten the number, No. 20, is it not? A. Yes, sir.

Q. And that in substance amounts to an approval of the work that was done on the buildings, does it not? A. Up to that date, I assume.

Q. And there was no objection registered to any of the buildings, was there?

A. None whatsoever.

Q. Now, as a matter of fact, why did it become necessary to make some substitutions and changes in the original plans and specifications? [65]

A. In the year 1946, I believe history would bear out, it was the most difficult time of building. Materials of all descriptions were exceedingly difficult to get hold of, especially to the point of 27 houses at one time rather than one, and during the same period not only the availability of materials was extremely difficult, but prices thereon were constantly going up. Every time you purchased anything in connection with these houses you paid a higher price for it than the previous purchase of the same material.

Q. Was it because of those conditions that certain changes were made in the original plans and specifications, is that right?

A. Yes. Even though we had a priority right to secure materials for these houses, it wasn't the highest priority right. I think that you would find that two or three higher ratings than that were in existence at that time, and these priority ratings

(Testimony of Jeff Tingle.)

only entitled us to purchase this material if we could locate it, and also a seller that would sell that material at that priority rating that we had.

Q. And it was because of these conditions that certain changes were made? A. Yes, sir.

Q. And only these? A. Yes, sir.

Q. Again you say the progress of the work while these changes were being made was approved by these inspectors? [66] A. Yes, sir.

Q. Which ultimately ended in the final report, Exhibit No. 20, that I just showed you, is that right? A. Yes, sir.

Q. Were there any omissions as such when these buildings were completed? A. No, sir.

Q. Were there any defects as such when those buildings were completed? A. No, sir.

Q. In other words, then, to express it flatly, you repudiate the fact that there were either construction defects or omissions, do you not?

A. Yes, sir.

Q. And you do not accept either these items or the figures that are in the schedule attached to the amended complaint, is that correct?

A. Yes, sir.

Mr. Wood: You may cross-examine.

(Testimony of Jeff Tingle.)

Cross-Examination

By Mr. Galles:

Q. Mr. Tingle, are you familiar with the architectural plans and narrative specifications and description of materials that were submitted to the F.H.A. office in connection with the 27 houses in Calhoun Lane Subdivision? A. Yes, sir.

Q. And would you say then that all requirements of those plans and specifications were met either with what was required [67] or by a substitution that was as good as what was required?

A. Yes, sir, and was approved by the inspectors of the F.H.A. on the job.

Q. Well, that is another matter. I know you have stated that, but I am leaving the approval of the inspectors out. If they hadn't given general approval, and if the F.H.A. weren't involved, would you say that the plans and specifications that are in exidence here, and speaking of these Calhoun Lane houses, were met by the actual construction out there either with what was called for or by a substitution as good as what was called for?

A. Yes, sir.

Q. I want to be sure you understand my question now. I am not talking about anything being left out because somebody said you could leave it out or substitute. What I am asking you is, taking these plans and specifications without any inspection or approval or anything else, you say that each

(Testimony of Jeff Tingle.)

requirement in there has been met, or was met when you completed the houses in Calhoun Lane Subdivision? A. Yes, as well as physically possible.

Q. Well, in some cases it wasn't physically possible, is that what you are saying?

A. Possibly so. I would have to go over it in very great detail.

Q. Well, now, the first item that is listed in Exhibit A [68] of the amended complaint under so-called construction defects and omissions is foundations. Do you know what was required in the way of foundations on the plans and specifications?

A. I know as it is shown on the plan.

Q. You are familiar with what is required on the plan?

A. Yes, sir, and in that instance there was just a question of depth there.

Q. Yes.

A. The very first time that the F.H.A., and they had at least three men there, including, I'm sure, Mr. Berg and Mr. Hill, there were three foundations as we had them in there and they were wide open to them.

Q. Now, when you say wide open, what do you mean?

A. I mean there was no back-fill around them, the footings were exposed, the whole foundations were exposed, the first time we walked on the ground with representatives of the F.H.A.

Q. And who were those representatives?

(Testimony of Jeff Tingle.)

A. I am sure that Mr. Berg was one, and Mr. Hill, if I am not mistaken, and Mr. Johnson.

Q. This was in the early part of the construction of some of the houses?

A. Yes, the very first of it. There were at least three foundations exposed there, and they pointed out to us the rule. The reason that I recall was that they had a rule that if the construction had not been started they [69] would loan a certain percentage of the value, or underwrite a loan; if the construction had been started it would be a lesser percentage of the valuation that they put on the property. And they held us all through the thing on the fact that these three exposed foundations constituted the start of the project, that the project had been started before.

Q. Well, now, did those exposed foundations with respect to those three houses meet the plans that are here in evidence? A. Not exactly.

Q. In what respect were they different?

A. Only in the depth of the wall.

Q. When you say the depth, you mean the distance that they went down into the ground and below the ground?

A. The distance above the footings.

Q. Yes. And what was required by the plans, do you remember? A. No, sir.

Q. Do you remember how much was actually there, what the depth was of the foundation actually there?

(Testimony of Jeff Tingle.)

A. There was an 8 x 16-inch footing, and 24-inch wall.

Q. Now, the 8 inches and 16 inches goes which way? A. The 8 inches is up and down.

Q. Up and down? A. Yes.

Q. And the 16 inches is the horizontal measurement? A. Yes. [70]

Q. So that 8 inches plus 24 inches includes not only the footing but the foundation?

A. Yes, sir.

Q. That is the vertical distance from the bottom of the footing to the top of the foundation?

A. Yes, sir.

Q. 24 inches? A. Yes, sir.

Q. Was that the dimension on all the foundations and footings in the 27 houses, or 24 houses? That is all we are interested in.

A. I think so, approximately.

Q. Now, the next item in Exhibit A of the amended complaint is framing. Do you know what the requirement was for the separation of the rafters, that is the measurement center to center?

A. I think that they were shown on the specifications as 16 inches on center. None of those houses have any extreme length of rafter, and the F.H.A. had rules and regulations as to satisfactory construction to them, that all of those rafters on 24-inch centers would meet all F.H.A. rules that they had at that particular time. It was undoubtedly brought to the attention of these inspectors, and as 24 inches on center was perfectly satisfac-

(Testimony of Jeff Tingle.)

tory for a house of that size and length of that rafter, why, they naturally approved it.

Q. All right, I can understand that, but as far as these [71] plans go there was a deviation between these plans and the actual construction. Now, what the reason was is something else.

A. Only with permission.

Q. Well, I understand that.

A. We are dealing with the same people.

Q. I understand, and I know that throughout this your contention is that it was with the approval of the F.H.A. that you built the houses as you did?

A. Yes, sir.

Q. But what I want in the record is that these houses were not built in accordance with these plans and specifications. Now I believe I am fair in saying that you can answer that yes, they are not built in accordance with these plans and specifications, and, of course, you are then entitled to state that there were modifications with the verbal approval of representatives of the F.H.A. Now, that is a fair statement, isn't it? A. Yes, sir.

Q. Well, then, based upon what was stipulated to yesterday concerning the deviations between the plans and specifications introduced here as Exhibits 3 through 13, would you say that the actual construction did not meet those plans and specifications, and I want to point out, for the purpose of shortening this examination, that what I am asking for is that all of these things then are correctly stated as being deviations between the plans and

(Testimony of Jeff Tingle.)

specifications [72] and the construction as finished?

A. Yes, sir.

Q. And then your only other explanation is that you had approval from an agent of the F.H.A. to make those changes?

A. And assuming that they represented not only the F.H.A. but the United States Government.

Mr. Galles: That's all.

Redirect Examination

By Mr. Wood:

Q. Just very briefly, Mr. Tingle, Mr. Galles has referred to verbal approval by inspectors. Is that all the approval you got of any deviations?

A. No, sir. The verbal part of it was on the job.

Q. From time to time, right out where the work was being done?

A. Yes, sir, with the superintendent on the job. Then we were notified officially through the bank by inspection reports.

Q. And ultimately the so-called deviations were approved, were they not, in Exhibit No. 20?

A. Yes, sir.

Q. So that you are not backed by the simple word-of-mouth approval on the ground from inspectors, are you? A. No, sir.

Q. You are standing on these inspection reports?

A. Yes, sir.

Q. And particularly the compliance and inspection report represented by Exhibit No. 20, is that right? A. Yes. [73]

Mr. Wood: That's all.

Mr. Galles: That's all.

(Witness excused.)

Mr. Wood: That's all we have, Mr. Master.

Mr. Galles: The Government has some rebuttal. Do you want to proceed at this time?

Mr. Maucus: If you are ready, I think we might as well go ahead.

Mr. Galles: Mr. Hill, please.

BEN S. HILL

having been previously sworn, was recalled and testified further on behalf of the plaintiff on rebuttal as follows:

Direct Examination

By Mr. Galles:

Q. You are the same Ben S. Hill that was sworn yesterday and testified in this case? A. Yes.

Q. Did you hear Mr. Tingle testify that you and Mr. Berg, and I believe Mr. Johnson, were out at the Calhoun Lane Subdivision early in the construction of some of the homes? A. Yes.

Q. Did you hear that? A. Yes.

Q. Do you recall such a visit to Calhoun Lane?

A. I don't recall being there in the early stages myself, no.

Q. But you have visited the Calhoun Lane Subdivision? [74] A. Yes, that's right.

Q. Do you remember what the status of the con-

(Testimony of Ben S. Hill.)

struction was when you did inspect that subdivision?

A. Yes. The houses were enclosed, I believe, the first time I actually went to the project.

Q. Do you remember seeing any foundations and footings that were open? A. No, I don't.

Q. Could they have been there in that condition and you not see them?

A. Well, it is possible. I didn't make the inspections myself. That wasn't my particular work. But I believe I would have noticed if some were exposed.

Q. At least your visit there was not with reference to inspecting as to compliance?

A. Not my particular job, no.

Q. What was your purpose in visiting the Calhoun Lane Subdivision?

A. Well, just to see how they were getting along, the appearance of them, the location of the project, and so forth.

Q. Was that routine while you were director, to visit these projects?

A. It was just routine, yes. The actual inspections were made by members of the underwriting staff.

Q. And whom did you have on your underwriting staff at that time?

A. Mr. S. L. Berg was the chief [75] underwriter.

Q. How many did he have under him?

A. He had, I believe, two at that time.

(Testimony of Ben S. Hill.)

Q. And that was for what area?

A. Well, that would take in all of Montana.

Q. As I understand it, there were just three men in the F.H.A. office for Montana to make inspections at that time?

A. As I recall it. As I recall it there were only three, yes.

Q. And who were the other two besides Mr. Berg?

A. Mr. H. A. Viken and A. L. Swanson were the other two.

Q. Had they, Mr. Viken and Mr. Swanson, been with the F.H.A. very long?

A. No, not very long.

Q. What was their prior experience insofar as construction work was concerned?

A. Well, they had both been teaching in the Billings High School, and during the summertime and over week ends both of them had constructed houses on their own account for sale. I believe that they had worked as private contractors, that is for themselves, and maybe did just a little bit of hiring to help out. But anyway, they were doing these things, that is where they got their experience up to that time.

Q. Was the amount of work required for these men to do, that is the number of inspections to be made reasonable, so that they could make a fair and detailed inspection of all [76] projects?

A. Well, of course, we were under staffed at that time, and these men were rather new in their duties,

(Testimony of Ben S. Hill.)

but they should have taken the time to make proper inspections, of course.

Q. I didn't hear that.

A. They should have taken the time to make proper inspections.

Q. Did you have occasion as director to review the compliance inspections that were made by Messrs. Viken and Swanson in the case of the Calhoun Lane Subdivision?

A. Well, I didn't review them with the idea of approving them and putting my name on them. That was in the underwriting department.

Q. Did you have another occasion to review them at a later date?

A. Well, just in a general way. At a later date?

Q. Yes. A. Yes.

Q. I mean during the course of this lawsuit did you investigate and review the compliance inspections of Messrs. Viken and Swanson? A. Yes.

Q. And what was the result of your investigation of these compliance inspection reports, with the manner in which these men made the reports? Did they properly inspect, or did you find that they improperly inspected? [77]

Mr. Wood: Now, if the Master please, I object to any testimony along these lines. In the first place, it is not proper rebuttal, and consequently irrelevant for any purpose; secondly, I object upon the ground that we have already conceded of record that certain inspections were made in 1948 by Mr. Hill and Mr. Riggs and Mr. Berg.

(Testimony of Ben S. Hill.)

We principally object on the ground that it is improper rebuttal, but I would also like to have the record show that we further object upon the ground that any attempt to repudiate or overrule the effect of Exhibit No. 20 is improper and incompetent for any purpose, as well as irrelevant.

Mr. Baucus: Would you read the question, please?

(The last question was read by the reporter.)

Mr. Galles: I would like to be heard, if the Master is in doubt.

The matter of compliance reports has been brought in by the defense through exhibits, and throughout the obvious intention has been to try to prove the manner in which these houses were completed.

Now, referring again to the law in the case, I wanted to point out by this question, which is relevant, and it is proper rebuttal because it was brought out on the defense part of it, that an agent of the Government can't bind the Government if he acted improperly, and that is the purpose of the question, and it is entirely relevant and material.

Mr. Baucus: Well, I think if you are able to prove by Mr. Hill that they didn't act properly it would be all [78] right. I will overrule the objection. I don't think it is terribly important anyway. You have your exception, of course.

Mr. Wood: I should like to have this objection

(Testimony of Ben S. Hill.)

to stand with respect to any further testimony along these lines from this witness.

Mr. Galles: Would you answer the question?

A. That is as to whether I thought the inspections were proper?

Q. Proper or improper, yes.

A. Well, I would say that they were improper in some respects.

Q. And what is the reason you say that? What is the basis for your conclusion?

A. Well, later inspections. Later inspections by Mr. Berg pointing out the deviations.

Q. Revealing that there were these deviations?

A. That's right.

Q. And, therefore, that is why you say it was improper inspection by Mr. Viken? Does that apply to both Mr. Viken and Mr. Swanson?

A. I believe they both inspected down there, yes.

Q. Now, I want to refer you, Mr. Hill, to the testimony of Mr. Hartwig, in which he stated that no one from the F.H.A. office called at his office with reference to the deviations or the construction work on the Calhoun Lane Subdivision. Did you or did you not call at the office of Mr. Hartwig in Billings with reference to the Calhoun Lane Subdivision? [79] A. Yes, I did.

Q. And when was that?

A. That was July 21, 1948.

Q. Who was with you?

A. Paul M. Johnson.

Q. Who was he?

(Testimony of Ben S. Hill.)

A. Assistant state director.

Q. That is your assistant?

A. Of the Federal Housing Administration, yes.

Q. Did anyone else accompany you?

A. No.

Q. Where was Mr. Hartwig's office?

A. In the Fratt Building.

Q. Here in Billings?

A. Here in Billings, yes.

Q. And did you see Mr. Hartwig?

A. Yes.

Q. On that occasion, at that time and place?

A. Yes.

Q. Your answer is yes? A. Yes.

Q. What was discussed?

A. We had with us Mr. Berg's detailed report of deviations from plans and specifications on, I believe, five of these houses, and we showed this to Mr. Hartwig.

Q. What did Mr. Hartwig say when you showed them to him, or generally what was the substance of the conversation?

A. We wanted to know what he would do with respect to these [80] deviations.

Q. And what was his response?

A. His response was that he would do nothing, he wouldn't even so much as raise a hand.

Q. Did that end the conference, or did you stay and discuss it further?

A. Well, that about ended it so far as that was concerned, and he mentioned to us that he had an-

(Testimony of Ben S. Hill.)

other project in mind out on the west end of Billings, to build some more houses, which we were not interested in discussing with him, in view of these deviations, of course.

Q. Would you repeat the date that that occurred?

A. July 21, 1948. I think that's the date. I just saw it in——

Q. (Interrupting): I was going to ask you how you know about that.

A. Well, I reviewed a carbon copy of a letter that I wrote to W. J. Lockwood, Assistant Commissioner of the Federal Housing Administration, Washington, D. C., giving that date, after Mr. Johnson and I had returned to the office in Helena from this visit with Mr. Hartwig.

Q. And at the time you wrote that letter you knew that was the correct date, time, and place?

A. Yes.

Mr. Galles: You may examine.

Mr. Wood: No cross-examination.

(Witness excused.) [81]

PAUL M. JOHNSON

having been first duly sworn, testified on behalf of the plaintiff in rebuttal as follows:

Direct Examination

By Mr. Galles:

Q. Would you state your name?

A. Paul M. Johnson.

(Testimony of Paul M. Johnson.)

Q. Where do you live? A. Billings.

Q. What is your present occupation or business?

A. I am the division engineer of the Montana Highway Department at present.

Q. Were you formerly employed by the Federal Housing Administration in Helena?

A. I was.

Q. What was your title?

A. I was employed with them for approximately five years, and held three different titles, starting as a cost engineer, going to the position of chief architect, and then finally as assistant state director.

Q. I understand from these titles then that you are an engineer? A. I am, sir.

Q. Did you hear Mr. Hartwig testify that no one called at his office with reference to the construction of the houses in the Calhoun Lane Subdivision?

A. I did.

Q. Did you hear Mr. Hill testify about his visit to Mr. Hartwig's office on July 21, 1948, with reference to the [82] same matter? A. I did.

Q. Do you recall being present at that time and place with Mr. Hill in a conference with Mr. Hartwig concerning these matters? A. I do.

Q. And would you describe in your own words the conversation that took place, or the substance of the conversation that took place between Mr. Hartwig and yourself and Mr. Hill?

Mr. Wood: Just a moment. I now make the same objection to any further testimony of this witness, particularly in answer to the question pro-

(Testimony of Paul M. Johnson.)

pounded, that was registered to the testimony of Mr. Hill, who just left the witness stand.

Mr. Baucus: Objection overruled.

A. Well, as I recall the matter, the office had been directed by the Washington office to contact Mr. Hartwig and to interview him regarding these deviations. We made the appointment, went to his office, and discussed the matter with him. As I recall, the conference was short. We called these deviations to his attention, and his statement was that there wasn't anything that he felt that he was obligated to do or would do about correcting them.

Q. Did that end the conversation, substantially?

A. Yes, except that, as Mr. Hill suggested, he mentioned a future project that he had that we didn't go into at that time. [83]

Q. Now, with reference to Mr. Tingle's testimony, did you hear him state that you visited the Calhoun Lane project early in the construction period? A. I did.

Q. Do you recall such a visit?

A. I was undoubtedly on the project. I was on it many times during the course of construction.

Q. And did you visit that project for the purpose—or what was your purpose, I will ask it that way?

A. Well, I think during the time, I am not certain about my duties, but I think during that time that I was in the architectural section of the F.H.A., and, of course, it was part of our duties to inspect these projects, and I probably was there

(Testimony of Paul M. Johnson.)

and looked over the construction to see the progress that was being made.

Q. Did you sign any compliance inspection reports as an inspector?

A. No, not as an inspector, no.

Q. You did sign in another capacity?

A. Yes. Our procedure was that when an inspector made an inspection, the report came back into the office, and the head of the department had to review the report and sign the report, and I undoubtedly signed some of these inspection reports that were made on the Calhoun Lane Subdivision as head of the architect section.

Mr. Wood: I ask the Master, please, that my registered objection may apply to all the further testimony of this witness.

Mr. Baucus: That is understood. [84]

Q. When you approved the inspection reports made by either Mr. Viken or Mr. Swanson—and they were inspectors at that time, is that correct?

A. That's right.

Q. Did you have any independent knowledge of whether or not the compliance inspection report was correct or incorrect?

A. No, I did not. It was a matter of routine for the record that we sign all these inspection reports to show that we knew the inspection had been made and that the report had been made and cleared through our office.

Q. Well, the fact that your signature is on there does not mean that you visited the project and of your own knowledge knew what was in the report?

(Testimony of Paul M. Johnson.)

A. That's correct.

Mr. Galles: You may examine.

Mr. Wood: No cross-examination.

(Witness excused.)

Mr. Galles: I am not able to say right now whether there will be any more as far as the Government is concerned.

Mr. Baucus: Would it be agreeable to you to adjourn until 2:00 o'clock?

Mr. Wood: Yes.

Mr. Galles: I would like to inquire whether the Master expects oral arguments on this or not?

Mr. Baucus: I don't believe so at this time, unless you both desire to do it.

Mr. Wood: No; I have no desire to do so. If you want anything from me I would prefer to submit it in the form [85] of a written memorandum.

Mr. Galles: I want to be heard, but in a written memorandum, if that is satisfactory.

Mr. Baucus: A written memorandum would be very satisfactory. If it is agreeable with both of you, I think we should waive oral argument and submit it on a written report.

Mr. Galles: All right. I am willing to do that.

Mr. Wood: I think I might make this further statement, that we should have this record before preparing written arguments.

Mr. Baucus: Mr. Galles, and Mr. Wood, under Rule 56, in a matter to be tried without a jury, a transcript must be made, so I believe that there

will be a transcript made of this under any circumstances.

Mr. Wood: I would like to place my order with the reporter for a copy.

Mr. Galles: I would like the noon hour to review my case.

Mr. Baucus: We will recess the hearing at this time until 2:00 o'clock.

(Whereupon, at 12:00 noon, the hearing recessed until 2:00 p.m.)

Afternoon Session

(The hearing continued, pursuant to noon recess, at 2:00 p.m.)

Mr. Galles: I have a few short witnesses on rebuttal. [86]

F. J. NEWMAN

having been first duly sworn, testified on behalf of the plaintiff in rebuttal as follows:

Direct Examination

By Mr. Galles:

Q. State your name, please.

A. F. J. Newman.

Q. And where do you live?

A. At the present time, you mean the street address?

Q. Where do you live, Mr. Newman?

A. At the present time it's 1850 Prior Lane.

Q. Did you own property in Calhoun Lane Sub-

(Testimony of F. J. Newman.)

division? A. Yes, I did.

Q. Did you buy that property from either of the men sitting at the table here, Mr. Hartwig or Mr. Tingle?

A. It was purchased from Hartwig & Tingle.

Q. And with whom did you deal in purchasing the property? A. Chiefly with Mr. Hartwig.

Q. Just to identify the property, what is the address?

A. What is the address? 117 Bruce Avenue. I believe that is Lot 4, Block 2, of Calhoun Lane Subdivision.

Q. Do you recall a personal conversation with Mr. Hartwig in connection with the purchase of the property you have described?

A. Yes, we had several of them.

Q. Would you describe when that took place, and where, and who was present?

A. Well, of course, we had two or three when they first started building the homes. Early in the summer of 1946, it was [87] at that time he set the price, and along in the fall, about October or November—I'd have to do some checking for the exact dates—the price was raised, at which time I had quite a conversation with Mr. Hartwig in his office. The only other person present was Mr. Jennings, but at that time I asked specifically about these curbs and black top streets.

Mr. Wood: If the Master please, that is not responsive to the question, and he is going on into

(Testimony of F. J. Newman.)

the conversation. You haven't asked him about the conversation, just if there was a conversation.

The Witness: Yes, there was. I would say either October or November.

Q. And Mr. Jennings, an employee of Mr. Hartwig, was present?

A. Yes. There were three of us in the office.

Q. Now, what was the conversation that took place between you and Mr. Hartwig?

Mr. Wood: That is objected to as not proper rebuttal, irrelevant.

Mr. Baucus: If your purpose is what I believe it is, I don't think it is necessary. There is a stipulation to what this man is testifying to. We are just lengthening the record.

Mr. Galles: I agree that it is repetitious, but as long as Mr. Hartwig specifically denied that he made these statements I thought that these people, or a few of them at least, should get on the witness stand so that their manner of testifying can be viewed by the Master, and in order to [88] resolve the conflict which now appears to exist between the parties, that is Mr. Hartwig and these purchasers, as to whether or not certain statements were made in connection with these special improvement assessments.

Mr. Wood: These matters were gone into on the Government's case in connection with the stipulation that we agreed to, and a lot of witnesses were named that were reputed to say that he made these representations to them, I should say regarding the

(Testimony of F. J. Newman.)

special assessments. Now that is not merely repetition, but it is not proper rebuttal.

Mr. Baucus: Well, I believe I will sustain the objection. I see no need for it.

Mr. Galles: You understand the purpose is to refute the present conflict that now exists in the record between the stipulation which we put in the record and the personal statement of Mr. Hartwig?

Mr. Baucus: Yes, I understand the purpose. I don't believe it is necessary to go into it.

Mr. Galles: Very well. The Government rests its case then.

(Witness excused.)

Mr. Wood: We have nothing further to offer.

Now, as I understand matters, it will be your desire, after we receive the transcript, to have the matter presented to you in written argument by the parties, is that correct?

Mr. Baucus: That's correct. And I would like to see you and Mr. Galles with the reporter immediately following [89] the close of the hearing, so that we may straighten out any chance of error in the transcript.

Mr. Wood: All right, we will do it now.

Mr. Galles: Very well. In order to avoid further delay in this matter which has been pending quite a long time, I wonder if it would be possible for all parties here, including the reporter, to accomplish whatever their purpose is at the earliest possible

date. I make that request, and I am sure everyone will co-operate.

Mr. Baucus: I am sure the reporter will co-operate.

Mr. Wood: We will have to wait until this record comes out, and then I take it that the Government will have to file the first memorandum argument, and that we will have time to reply to it.

Mr. Galles: I wonder if we could fix the time within which the Government will be expected to file a memorandum argument, the answering memorandum by the defendants, and the reply by the Government, if it sees fit?

Mr. Baucus: How many days would you want, Mr. Galles, after the receipt of the transcript?

Mr. Galles: In order to take care of conflicts with other matters, I think that 15 days would be satisfactory.

Mr. Wood: Well, I think as far as I am concerned, I can have the next 15 days, can't I?

Mr. Baucus: Yes, sir.

Mr. Galles: And then 5 days is all I would need for a reply. [90]

Mr. Wood: Now, is there something else that you wanted to straighten out?

Mr. Baucus: Not on the record. I just want to discuss the matter with you.

This hearing is terminated.

(Whereupon, at 2:15 p.m., the hearing in the above-entitled matter was closed.)

Certificate

United States of America,
State of Montana—ss.

I, Gladys B. Huntington, do hereby certify that I am a shorthand reporter residing at Billings, Yellowstone County, Montana; that I was called to report the hearing in the above-entitled matter; that the foregoing and annexed transcript constitutes a full, true and correct transcription of the proceedings had and the testimony taken in the case of United States of America, Plaintiff, vs. A. W. Hartwig and Jeff Tingle, Civil No. 1089, at Billings, Montana, on January 17 and 18, 1955, before William G. Baucus, Special Master, which was recorded in shorthand and transcribed on the typewriter by me.

Dated this 27th day of January, 1955.

/s/ GLADYS B. HUNTINGTON,
Reporter.

[Endorsed]: Filed March 7, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, E. Warren Toole, Clerk of the United States District Court in and for the District of Montana,

do hereby certify that the papers hereto annexed, and the accompanying two volumes of prior records on appeal, and the accompanying volume consisting of the Transcript of Hearing before the Special Master, with exhibits and related papers included therein, are the original records of this Court filed in Civil Action No. 1089, United States of America, Plaintiff, versus A. W. Hartwig, et al., and designated by the parties as the latest record on appeal in said cause.

Witness my hand and the seal of said Court this 22nd day of May, A.D. 1956, at Great Falls, Montana.

[Seal] E. WARREN TOOLE,
Clerk as Aforesaid.

By /s/ C. G. KEGEL,
Deputy Clerk.

[Endorsed]: No. 15145. United States Court of Appeals for the Ninth Circuit. A. W. Hartwig and Jeff Tingle, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Montana, Billings Division.

Filed: May 24, 1956.

Docketed: May 31, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Case No. 15145

UNITED STATES OF AMERICA,

Appellee,

vs.

A. W. HARTWIG and JEFF TINGLE,

Appellants.

STATEMENT OF POINTS AND DESIGNATION OF RECORD

The Appellants in the above-entitled action, having appealed to the above-named Court from a judgment in said action, entered February 24th, 1956, of the District Court of the United States for the District of Montana, the said Appellants now, in compliance with Rule 17(6), of The Rules of Practice of the above-named Court, present the following to wit:

I.

Statement of Points Upon Which Appellants Intend to Rely

1. That the amended complaint of the Appellee does not state a cause of action against the Appellants, or either of the Appellants, in either of the separate counts pleaded;

2. That the Appellants, under the record in this case, are not liable, in any event, for the special assessments claimed in the amended complaint;

3. That the Appellants, under the record in this case, are not liable, in any event for the so-called defects or omissions in construction, pleaded in the amended complaint, in that there are no such defects or omissions;

4. That the Master, appointed in the lower Court, erred in his report in the following respects, viz:

(a) In disregarding the facts established of record and the applicable principles of law;

(b) In failing to make the findings of fact requested by the defendants, now the Appellants in this Court;

(c) In the making of his findings of fact and conclusions, in that the said findings of fact and conclusions are contrary to the evidence in the record and are not in accordance therewith and, furthermore, do violence to applicable and established principles of law;

(d) In disregarding the objection made by counsel for the defendants, now the Appellants, at the outset of the hearing before the Master, to the introduction of any evidence upon the ground that the amended complaint fails to state a claim against the defendants, now the Appellants, upon which relief can be granted;

(e) In Paragraph 3 of his findings of fact and in the following statement made by the Master therein, to wit: "This finding of fact is compelled

by Exhibit 15, in the face of which subsequent conflict in the testimony and argument by learned counsel for the defendants must fail. The representations by the defendants that street and utilities improvements would be installed by them and included in the sale price and that the purchasers would not be required to pay any special assessments, as made in said Exhibit 15, are clear and unambiguous and were not altered by other exhibits or testimony." And that the Master erred in this connecttion in that said Exhibit 15 was made and submitted upon May 18, 1946, which was prior to the enactment into law, upon May 22, 1946, of the Veterans' Emergency Housing Act of 1946, upon which Act this action is predicated by the Appellee, and that accordingly Exhibit 15 was not made pursuant to or in futherance of the said Act and is without legal effect herein. In further support of the error claimed in this paragraph hereof, the Appellants rely upon their objection made to offered Exhibit 15, which objection was overruled, and which said objection is predicated upon the ground that the exhibit is irrelevant for any purpose.

(f) In Paragraph 3, of his findings of fact, in disregarding First, the plain language of the Veterans Administration Housing Act of 1946, which statute, in Section 3b thereof, defines "improvements," for the purpose of the law, as "improvements sold with the housing accommodations"; and Second, the fact of record that defendants have sold no improvements in their sales of housing accom-

modations; and, Third, in that there is no evidence in the record that the defendants, now the Appellants, have made any express or other representations that the maximum sale price established included or would include any special improvements of any kind.

(g) In stating, as a finding, it is his opinion that the approval of variations in construction by representatives of the Federal Housing Administration was not within the scope of their authority, and that the Master erred in this connection in that under Paragraph 5(e), of Priority Regulation No. 33, it is provided that a builder who uses the rating therein provided for to get materials for housing accommodations must construct them in accordance with the description given in the application except where he has obtained from the Federal Housing Administration an approval for change from the application; and in further support of this objection to the Master's report, the Appellants will present the point that the record before the Master establishes, without contradiction, that any variations in construction work involved were neither defects nor omissions but were changes in construction that were approved, pursuant to law, by the F.H.A., by the various compliance reports involved and placed in evidence.

6. That the judgment of the lower Court, from which appeal has been taken herein, is without support in the record and is contrary thereto and to the applicable law.

II.

Designation of the Record Which Is Material to the Consideration of This Appeal

1. All of the pleadings in the lower Court, and the balance of the record, all as set forth in the printed record in Cause No. 13267 in the above-named Court, together with stipulation of counsel made in the District Court in the above-entitled action, bearing date of April 6, 1956, and duly filed April 17, 1956, that such printed record in said Cause No. 13267 shall constitute part of the record upon this appeal.

* * *

No assignment of errors was submitted in the lower Court, under Rule 75d, of the Federal Rules of Civil Procedure, in that the designation in the lower Court of the record is a designation of the complete record of all of the proceedings taken in the lower Court in the above-entitled action.

Dated: June 4th, 1956.

/s/ STERLING M. WOOD,
Attorney for Appellants.

Service of Copy acknowledged.

[Endorsed]: Filed June 7, 1956.

Office - Supreme Court, U.S.
FILED
SEP 30 1957
JOHN T. FEY, Clerk

No. 515

In the Supreme Court of the United States

OCTOBER TERM, 1957

A. W. HARTWIG and JEFF TINGLE, Petitioners

v.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

STERLING M. WOOD,
Attorney for Petitioners.

INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	17
APPENDIX	18

CITATIONS

CASES

Belcher, et al., v. Linn, 24 How. 508, 16 L.Ed. 754	16
D. Ginsberg and Sons v. Joseph Popkin, 285 U.S. 204, 76 L.Ed. 704	8
Great Northern Railway Company v. United States, 208 U.S. 452, 52 L.Ed. 567	7
Hertz v. Woodman, et al., 218 U.S. 205, 54 L.Ed. 1001	7
Moresville Cotton Mills v. National Labor Relations Board, 97 F.2d 959	10
Sedivy, et al., v. Superior Home Builders, Inc., et al., 188 F.2nd 729	14
State of California v. Deseret Water, Oil and Irrigation Co., 243 U.S. 415, 61 L.Ed. 821	9
Territory of Alaska v. American Can Co., et al., 137 F.Supp. 181	11
United States of America v. Robert Fortier, et al., 342 U.S. 160, 96 L.Ed. 179	14
United States of America v. Katz, et al., 271 U.S. 354, 70 L.Ed. 986	11

In the Supreme Court of the United States

OCTOBER TERM, 1957

No.....

A. W. HARTWIG and JEFF TINGLE, Petitioners

v.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

The undersigned attorney, acting on behalf of A. W. Hartwig and Jeff Tingle, prays that a writ of certiorari issue to review the judgment entered in the above case by the United States Court of Appeals for the Ninth Circuit on May 23, 1957, which affirmed a judgment of the District Court of the United States for the District of Montana.

OPINION BELOW

The opinion of the said Court of Appeals (Appendix, infra, p. 18) is reported in 244 F. 2d 849, in the advance sheets, of that publication, of August 12, 1957.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit (Appendix, infra, p. 28) was entered May 23, 1957; and the petition in that Court for a re-hearing was denied July 8, 1957 (see page 394 of the record certified to this Court by the Clerk of the said Court of Appeals). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The question presented is whether the Court of Appeals for the Ninth Circuit erred in affirming the judgment of the lower court, and involves a consideration (a) of the effect of the repeal by the Housing and Rent Act of 1947 of the Veterans Emergency Housing Act of 1946, and (b) of the effect of the ruling by this Court that Priorities Regulation No. 33, issued by the Civilian Production Administration, was repealed by the said 1947 Act.

Briefly stated, the petitioners herein contend that in affirming the judgment of the lower court, the Court of Appeals for the Ninth Circuit disregarded the effect of the Housing and Rent Act of 1947, enacted by Congress, and also settled and controlling decisions of this Court; and this contention is made with entire respect for the said Court of Appeals.

STATEMENT

The action here involved, and in connection with which this petition for a writ of certiorari is presented,

was brought October 8, 1948, in the United States District Court for the District of Montana, Billings Division, by the United States of America, as plaintiff, against A. W. Hartwig and Jeff Tingle as defendants, and also against one W. C. Jennings, as a defendant, who died before the case went to trial.

The amended complaint in the case at bar upon which the case was tried, and the attitude of Government counsel throughout the record, establish that the United States of America claims jurisdiction of this action is conferred by the Veterans Emergency Housing Act of 1946 (60 Stat. 207, 50, U.S.C.A. App., Sec. 1821, et seq.) and by Priorities Regulation No. 33, promulgated by the Civilian Production Administration, and those contentions of the government are denied in the answer to the amended complaint of the petitioners herein. The said answer also denies the allegation of the amended complaint that the aforesaid Priorities Regulation No. 33 has been in effect at all times material to this action; and, generally, the said answer of petitioners herein puts the government to its proof. This action was brought in the trial court October 8, 1948; and yet the said 1946 Act was repealed June 30, 1947, by the Housing and Rent Act of 1947. The repeal clause of the said 1947 Act repeals expressly all the various sections of the said 1946 Act involved, and concludes with the following proviso:—

"Provided, that any allocation made or committed, or priorities granted for the delivery, of any housing materials or facilities under any regulation or order issued under the authority contained in said act, and before the date of the enactment of this act, with respect to veterans of World War II, their families, and others, shall remain in full force and effect."

In the first count of the said amended complaint herein it is alleged that the petitioners herein, the defendants below, applied for and received authorization for priorities assistance from the government to construct a number of dwellings in Montana and that the maximum sales price finally established was $8,000.00 for each dwelling for which the priorities assistance was granted. Then it is alleged that the petitioners herein represented, by plans and specifications and otherwise, that the said maximum sales price included all special assessments and that such established maximum sales price was required by Priorities Regulation No. 33 to include all such improvements as water mains, sewers, etc. It is alleged finally in this count that, after the issuance of authorization and priorities assistance and during the time Priorities Regulation No. 33 remained in effect, the defendants, the petitioners herein, sold 25 authorized dwellings and violated the Acts involved and the said Regulation by selling some of the dwellings at prices in excess of the maximum sales prices approved by the Federal Housing Administration, and by failing to construct the dwellings in accordance with the said plans and specifications; and the government

then lists claimed excessive sale prices and defects and omissions in an attached schedule, as a result of which it is alleged, finally, in this count that the defendants were enriched and that the purchasers of the dwellings constructed have been deprived of things of value to which they were entitled.

In the second count of the said amended complaint most of the allegations of the first count, as above, are repeated, and it is alleged, further, that the defendants violated the law and the regulations by selling the dwellings involved without taking care of special improvement taxes assessed against the properties involved.

The answer of the petitioners herein, the defendants in the trial court, to the amended complaint, puts in issue all the essential allegations of that amended complaint. Furthermore, the defendants pleaded defensively in their said answer that, in good faith, they constructed and completed the housing accommodations, to which the second count of the amended complaint refers, in substantial compliance with the specifications, descriptions of materials and plans involved and approved, and that, then, the government, acting through the Federal Housing Administration, inspected and accepted the dwellings so completed as in full conformity with the specifications, descriptions and plans, and as full performance by and on the part of the said defendants, the petitioners herein, of their contract with the government, or otherwise, for

the construction and completion of the housing accommodations and as full satisfaction and in full discharge of all and every the obligations of the said defendants, the petitioners herein, or either of them, under any such contract. The trial court awarded the government judgment as demanded in its amended complaint, and that judgment has been affirmed by the Court of Appeals for the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Ninth Circuit is in conflict with decisions of this Court that are applicable by reason of the repeal by Congress of the Veterans Emergency Housing Act of 1946 by the Housing and Rent Act of 1947; and particularly disregards the effect of the repeal by Congress of Priorities Regulation No. 33 that was promulgated by the Civilian Production Administration, and which Regulation is not a statute in any sense of the word.

1. In the Housing and Rent Act of 1947, approved June 30, 1947, Congress expressly repealed the Veterans Emergency Housing Act of 1946, and concluded that piece of legislation with a saving clause that, for the convenience of this Court, has been quoted, supra, herein. Nevertheless, the government stands primarily in this action, brought in 1948, upon the said 1946 Act, which it claims was still effective by virtue of the general statute 1 U.S.C. 109 (also referred to as Sec. 13 of the Revised Statutes) and disregards, as has the Court of Appeals for the Ninth Circuit, in its decision herein, the

rule laid down by this Court that the said general statute has no application to a repealed Act of Congress, where, as we submit is the case in the litigation at bar, *"the necessary implication arising from the terms of the law as a whole"* would *"set at naught"* the *"legislative mind **** by giving effect to the provisions"* of the said general statute. The italics comprise language taken from a decision of this Court presently to be cited and quoted from. The decision is that of Hertz v. Woodman et al., 218 U.S. 205, 54 L.Ed. 1001. In the Hertz case this Court, speaking through Mr. Justice Lurton, considers the effect of the Act of Congress 1 U.S.C. 109 above mentioned. After quoting from the statute in question, this Court had the following to say:

> "This provision has been upheld by this Court as a rule of construction applicable, when not otherwise provided, as a general saving clause, to be read and construed as a part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress" (citing cases).

Among the cases cited by this Court in the Hertz case is that of Great Northern Railway Company v. United States, 208 U.S. 452, 52 L.Ed. 567. This Court then quotes in the Hertz case from the Great Northern Railway Company decision, as follows, to-wit:

> "As the section of the Revised Statute in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested *either expressly or by necessary implication* (the italics herein are ours) in a subsequent enactment. But

while this is true, the provisions of Section 13 (the statute under consideration) are to be treated as if incorporated in and as a part of subsequent enactments, and therefore, under the general principles of construction requiring, if possible, that effect be given to all parts of a law, the section must be enforced *unless, either by express declaration or necessary implication, arising from the terms of the law as a whole,* it results that the legislative mind will be set at naught by giving effect to the provisions of Section 13 ****."

Then, continuing, this Court has the following to say further in the Hertz case, to-wit:

"The repealing Act here involved includes *a saving clause, and if it necessarily, or by clear implication,* conflicts with the general rule declared in Section 13, the latest expression of the legislative will must prevail ****. The significance of Section 13 is therefore this: That if, prior to the repealing act, the defendants in error were under any liability or obligation **** that obligation or liability was not relieved by the mere repeal of that section, nor as a consequence of the *saving clause* in the repealing act, *unless the special character of that clause, by plain implication,* cuts down the scope and operation of the general rule in Section 13."

It is fundamental and settled law that all parts, provisions or sections of a statute must be read, considered or construed together, and that each must be considered with respect to, or in the light of, all the other provisions or sections, and construed in connection, or harmony, with the whole. 82 C.J.S., Statutes, p. 694, et seq.,

80 Am. Jur., Statutes, Par. 358.

And in D. Ginsberg and Sons v. Joseph Popkin, 285

U.S. 204, 76 L.Ed. 704, this Court says it is a "cardinal rule" that effect shall be given to every clause and part of a statute. Furthermore, in State of California v. Deseret Water, Oil and Irrigation Co., 243 U.S. 415, 61 L.Ed. 821, this Court said:

> "The proviso *** is an important part of it (the statute to be construed) and, according to a familiar rule, must be given some effect."

Thus, in determining whether "by necessary implication" the 1947 Housing & Rent Act extinguishes the claimed rights sought to be enforced here by the government, effect must be given to the proviso in the said 1947 Act. In this connection it must be remembered that, without this proviso clause in the said 1947 Act, then, under U.S.C. 109, all rights created under the Veterans Emergency Housing Act of 1946, and existing at the time of the said 1947 act, would remain in force, including the items covered by the terms of the aforesaid proviso. The members of Congress, who passed the 1947 Act, were chargeable with a knowledge of the law existing at that time, and thus knew that the repeal by them of a federal statute, without more in the repealing act, would keep in effect all rights established under that federal statute while in force, in that U.S.C. 109 so provides, and that, consequently, it would be unnecessary and absurd to add a proviso to keep any such rights in effect. Members of Congress must also be charged with knowing (for such is the law) that when they added the proviso to the 1947

Act, supra, some effect would have been given to the terms of that proviso in applying the Act, as this Court has held in the case of State of California v. Deseret Water, Oil and Irrigation Co., cited supra. Giving effect to that proviso as drawn, and as added to the 1947 Act, and considering what members of Congress must be charged with knowing, when the 1947 Act was enacted into law, the plain *implication* of the proviso, which Congress put into the Act, is that the proviso sets forth the only rights left in effect by the repealing act and that all other rights under the 1946 Act, existing before its repeal, ended June 30, 1947. To contend to the contrary would be to charge Congress with doing an absurd thing in putting the proviso into the said Act, which may not be done under the law. It follows, therefore, that 1 U.S.C. 109 has no application whatsoever in the case at bar and that the claimed rights, made the basis of the amended complaint of the government herein, were extinguished by the 1947 Act and did not exist when this action was brought in 1948.

It seems apt, in connection with the foregoing, to refer to some further authorities that are to the point here, and to quote pertinent portions of the decision in Moresville Cotton Mills v. National Labor Relations Board, decided by the Circuit Court of Appeals for the Fourth Circuit, and reported in 97 F.2d 959. Paragraph 3 of the syllabus of the case reads as follows:

"The court may read into a statute something not expressed by Congress when the literal application of the statute would lead to absurd results."

The said court in this decision relies upon United States of America v. Katz, et al., 271 U.S. 354, 70 L.Ed. 986, where this Court said:

"All laws are to be given a sensible construction; and a literal application of the statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

In Territory of Alaska v. American Can Co., et al., 137 F. Supp. 181, the court carefully considers existing law that is applicable here, and the following is quoted from that decision for the convenience of this Court, to-wit:

"It is a fundamental rule of statutory construction that a general saving clause or statute preserves rights and liabilities which have accrued under the act repealed and that they operate to make applicable in designated situations the law as it existed before the repeal, *unless such application is negatived by the express terms or clear implication of a particular repealing act*, or where not otherwise provided by the repealing act. *And, where there are express savings clauses in repealing statutes* which are later in time, *constituting the express will of the Legislature, such have been taken as an indication of legislative intent to save nothing else from the repeal, and the general saving statute in force in the state does not apply.* 82 C.J.S., Statutes, Par 440, p. 1014; 50 Am. Jur., Statutes, 534-5, Secs. 527-528; Great Northern Ry. Co. v. United States, 208 U.S. 452, 28 S. Ct. 313, 52 L.Ed. 567; Wilmington Trust Co. v. United States, D.C., 8 F. 2d 205; United States v. Chicago, St. P., M. &

O. Ry. Co., D.C., 151 F. 84; United States v. Standard Oil Co., D.C., 148 F. 719.

"In the Wilmington Trust Co. case (28 F.2d 207) the District Court of Deleware held that repeal of parts of the Revenue Act of 1918, 40 Stat. 1057, by the Revenue Act of 1921, 42 Stat. 227, which provided that the parts repealed shall remain in force as to "the assessment and collection of all taxes which have accrued" under the previous act, left all of the estate tax provisions of the former statute except those expressly saved by the act 'as completely obliterated and extinguished * * * as if the repeal had been absolute and unqualified', since the saving clause kept alive the repealed parts of the earlier act for collection of only those taxes 'accrued' under the earlier act, and saves to the government only such previously accrued taxes. In this case the general Federal savings clause, R.S. Sec. 13, 1 U.S.C.A., Sec. 29, was relied upon to show that the liability of the tax was not destroyed by the repeal of the statute. Upon this point the opinion states:

" 'Of this statute the court, in Great Northern Railroad Co. v. United States, 208 U.S. 452, 28 S.Ct. 313, 52 L.Ed. 567, said: As it "has only the force of a statute, its provisions cannot justify a disregard of the will of Congress *as manifested, either expressly or by necessary implication, in a subsequent enactment.*" *As the estate tax provisions of the Revenue Act of 1918 were expressly repealed, with specified exceptions, it must be assumed that the exceptions specified constituted a denial of others.* To enlarge the exceptions by adding the provisions of Section 13 of the Revised Statutes thereto, or, more accurately stated, to add to the saving clause of the repealing statute the provisions of R.S. Sec. 13, which, as I understand it, is in implied, if not direct, conflict with the first sentence of the saving clause of the repealing act, would, I think, be a plain disregard of the will of Congress as manifested in the repealing act.' * * * *

"There is another fundamental rule of statutory construction which must be considered in this connection, and that is the rule of 'expressio unius est exclusio alterius'—the mention of one is the exclusion of others—which requires a holding that the Legislature intended to save the taxes specifically mentioned in the repealing act and to exclude all others. Sutherland on Statutory Construction, 3rd Ed. Vol. 2, p. 412, Sec. 4915; p. 416, Sec. 4916; Jones v. H. D. & J. K. Crosswell, Inc., 4 Cir., 60 F.2d 827; Rybolt v. Jarrett, 4 Cir., 112 F.2d 642; Territory ex rel. Sulzer v. Canvassing Board, 5 Alaska 602, at page 622.

"A decision of the Supreme Court of Kansas in the case of State v. Showers, 34 Kan. 69, 8 P. 474, 476, is especially in point, as it relates to a state saving clause as distinguished from the Federal saving clause. In that case the Court was considering the effect of a general saving statute identical with the Alaska statute, as against a later specific savings proviso contained in a repealing act. The opinion of the Court states as follows:

"'The question as to what should be repealed and what saved was before the legislature. They had the entire subject-matter thereof under consideration, and evidently intended to cover the entire ground; and evidently intended that nothing should be repealed except what they expressly repealed, and that nothing should be saved except what they expressly stated should be saved. They expressly saved some things; therefore it must be inferred that they intended to save no others. *Expressio unius est exclusio alterius.*'

"The opinion also points out that if the special saving clause in the repealing act was not intended to cover the entire ground and to substitute for the general savings statute, then it 'has no office to perform,' for the general saving clause would save all that it saves and very much more."

It follows, it is respectfully submitted, that, upon the foregoing grounds alone, the amended complaint in this action does not state facts sufficient to constitute a cause of action in either of the counts pleaded, and hence, that the Court of Appeals for the Ninth Circuit erred in rendering the decision herein at which this petition for a writ of certiorari is directed.

2. Apart from the intent of Congress, and the plain implications of the proviso, as per the argument and authorities supra, it is important to consider the effect of the Housing and Rent Act of 1947 upon Priorities Regulation No. 33, and also the legal importance of that Regulation as a necessary basis for the action at bar brought by the government. This Court has decided in United States of America v. Robert Fortier, et al., 342 U.S. 160, 96 L. Ed. 179, that statutory authority for Priorities Regulation No. 33 was repealed by the Housing and Rent Act of 1947, except only as otherwise provided in the proviso of the Act, which proviso, by its plain terms (supra) does not relate at all to any of the matters in the action at bar. And in Sedivy, et al., v. Superior Home Builders, Inc., et al., 188 F.2nd 729, Paragraph 5 of the syllabus of the case reads as follows:

> "Priorities Regulation 33 providing that no person may sell any dwelling built under regulation to Veterans for more than approved maximum sales price, was repealed by the Housing and Rent Act of 1947."

Thus, the further contention of the petitioners herein is that there was no basis whatever in law, when the action at bar was brought, for claiming that the alleged rights, made the basis of the amended complaint in this action, did then exist, in that the Veterans Emergency Housing Act of 1946 does not, alone, in terms or otherwise, create the claimed rights sued upon by the government in the case at bar. In order to establish those claimed rights the government must stand (as it is doing in its pleading in this case) not only on the Veterans' Emergency Housing Act of 1946 but also, and primarily, on Priorities Regulation No. 33. That Regulation (authorized by the 1946 Act) *alone sets forth* the provisions that create the claimed rights made the basis of suit herein. The said 1946 Act and the Regulation are submitted to this Court, (without quotations therefrom, which would have to be most voluminous) to speak for themselves in this connection and to establish the foregoing as a correct statement both of fact and of law. Thus, since Priorities Regulation No. 33 was repealed and nullified June 30, 1947, by the enactment of the Housing and Rent Act of 1947, and then ceased to exist, it follows that there is no basis, in law, for the claims pleaded herein by the government in this action, that was brought in the fall of 1948. And, accordingly the Court of Appeals for the Ninth Circuit has plainly erred in its rulings in that connection herein. Furthermore, it should be noted that the conclusion just

stated herein is confirmed by the fact that 1 U.S.C.A. 109, relates to *statutes, and not to regulations issued under a statute;* and there is nothing whatever in any act of Congress providing that a regulation, or rights created by it, shall remain in effect after the regulation has been repealed, as here, and nullified by an act of Congress.

3. But, apart from the foregoing under Subdivision 2 hereof, and assuming for the sake of argument only that Priorities Regulation 33 was effective herein when the suit at bar was brought, then, nevertheless, the Court of Appeals for the Ninth Circuit erred in holding that Section 944.54(e) thereof requires written approval for changes in plans from those specified in the original application. This portion of the said regulation reads as follows:

> "Construction of a project. A builder who uses the HH rating to get materials for housing accommodations must construct them in accordance with the description given in the application, except where he has obtained from the Federal Housing Administration approval for a change from the application."

This Court, in Belcher, et al., v. Linn, 24 How. 508, 16 L.Ed. 754, said:

> "When power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confined to his or their discretion, the acts so done are, in general, binding and valid as to the subject matter."

Thus, Exhibit 20 in the case at bar—a "Compliance Inspection Report" — in which the public officers in

charge certified, "Building Improvements Acceptably Completed" and "Closing papers may be submitted," is binding and valid; and there is no basis in any event, therefore, in the case at bar, for the claim of the government in its amended complaint that the buildings involved were not constructed and completed as required. Upon this ground alone the Court of Appeals for the Ninth Circuit erred in the rendition of its judgment herein at which this petition for a writ of certiorari is directed.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

STERLING M. WOOD
Attorney for Petitioners

September, 1957.

APPENDIX

1. Opinion of the Court of Appeals

No. 15145

May 23, 1957

United States Court of Appeals for the Ninth Circuit

A. W. HARTWIG and JEFF TINGLE, Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the District of Montana, Billings Division

Before: DENMAN, Chief Judge, and BONE and ORR, Circuit Judges

ORR, Circuit Judge:

The United States instituted an action against appellants, A. W. Hartwig and Jeff Tingle, under Sec. 2(a)(6) of the Second War Powers Act, 56 Stat. 177 (1942), and the Veterans Emergency Housing Act of 1946, 60 Stat. 207 (1946), to compel restitution of charges alleged to have been made above the ceiling price set by the Federal Housing Administration to named purchasers of

dwelling units constructed and sold by the appellants, and for the value of alleged construction deficiencies in violation of Priorities Regulation 33, which was issued in accordance with the Veterans Emergency Housing Act of 1946.

Appellants applied for and received authorization for priorities assistance from the Federal Housing Administration, hereafter F.H.A., on or about July 1, 1946, to construct twenty-seven dwelling units in the Calhoun Lane Subdivision of Yellowstone County, Montana. The maximum sales price of each unit was established at $8,000 upon the basis of certain representations of plans, specifications, and requisite materials. Through the use of the materials priorities, the appellants obtained building materials actually used in the construction of the particular dwellings. The sale of all of the units occurred no later than June 17, 1947.

Priorities Regulation 33, 11 F.R. 601, 4085, (1946) was promulgated by the Civilian Production Administration, whose functions were transferred to the F.H.A., which adopted Priorities Regulation 33. The Regulation provided priorities assistance to carry out the Veterans Emergency Housing Program, calling for the construction of moderate and low cost housing accommodations to meet the needs of returning veterans.

Priorities Regulation 33, Sec. 944.54(e) provided:

> '*Construction of the project.* A builder who constructs, converts, alters or repairs housing accommodations under this regulation must do the work in accordance with the description given in the application, except where he has obtained written approval for a change from the agency which approved the original application.'

Priorities Regulation 33, Sec. 944.54(g)(ii) provided:

> 'A builder must not sell a one-family dwelling unit built or converted under this regulation, *including the land and all improvements (including garage if provided)*, for more than the maximum sales price specified in the application, as approved, including within this sales price the amount of any brokerage fees or commissions paid in connection with the sale, whether paid by the builder or by the purchaser.' (Underscoring Supplied)

It is alleged in plaintiff's first cause of action that the sale of 25 of the units have construction deficiencies which fail to meet the plans and specifications contained in appellants' application approved by the F.H.A. The second cause of action alleges that the sale of 9 units was in excess of the maximum sales price of $8,000, and also alleges that a special improvement district for the construction of water mains, sewers, curbs, gutters, and pavement by Yellowstone County was created upon the petition of appellants. The cost of these improvements were subsequently assessed against the adjacent dwellings, and became tax liens against the 25 units sold by the appellants. The Government alleges that the maximum sales price of $8,000, as represented by appellants and as required by Priorities Regulation 33, Sec. 944.54(g)(ii), included all special improvements, such as sewers, water mains, curbs, gutters and street paving. Hence, it is alleged, the purchasers were forced to pay in excess of the authorized ceiling prices for the units, thereby unjustly enriching appellants.

The complaint prayed for (1) a mandatory injunction directing the appellants to complete the construction of

the units in accordance with the plans and specifications, or in the alternative, an award to each purchaser in the amount of the value of the nonconformity of the units; (2) a mandatory injunction directing the appellants to restore to the named purchasers the amounts of direct overcharges received by the appellants in the sale of the units at over-ceiling prices; and (3) a mandatory injunction directing appellants to make restitution to the named purchasers by paying the special improvement levy of Yellowstone County, Montana, against each of the 25 dwellings, or be required to reimburse the named purchasers in the amounts of the tax liens.

Appellants admit having caused Yellowstone County to create a special improvement district for the construction of water mains, sewers, curbs, gutters, and pavement, which resulted in the tax lien against the dwellings sold by appellants. They deny, however, that the maximum sales price of $8,000 included all or any of the special improvements provided by the special improvement district. Appellants also deny that any deficiencies as to plans and specifications in the construction of the units exist, and affirmatively allege that the units were constructed in substantial compliance with the plans and specifications, and were accepted after inspection by an agent of the F.H.A. as being in full conformity therewith.

Appellants deny any direct overcharges. Heretofore, the trial court, taking the view that the appellants, in substance, admitted in their answer that the units were sold in excess of the maximum price, entered a summary judgment granting the relief prayed for relative to the special improvement levy in the second cause of action of the complaint. On appeal this court, finding that a

substantial question of fact was presented for determination, remanded the cause for further proceedings. See Hartwig et al v. U. S. A., 9 Cir., 1954, 209 F.2d 604.

Upon remand, the trial court referred the case to a special master for a hearing and a finding as to whether any of the units were sold at prices in excess of the maximum price agreed upon, and the value of any construction defects existing.

The special master found that representatives of the F.H.A. accepted the units in question as being in substantial compliance with the plans, but that said representatives acted in excess of their authority; that notwithstanding such acceptance, the construction defects and omissions claimed did exist, and that the purchasers should be compensated therefor.

The master also found that the maximum authorized sales price of $8,000 was intended by the parties to include the special improvements for which the special improvement district was formed and upon which improvement taxes were levied, and that the purchasers suffered indirect overcharges, for which they should be compensated by appellants.

The District Court, after reviewing the evidence, adopted the findings of the special master in full. The master having omitted to make findings on the alleged direct overcharges, the District Court supplied this omission and found that nine of the units were sold at a price in excess of $8,000 by virtue of extra charges for electric fixtures which should have been included in the $8,000 price. The District Court further found that the interest upon the tax liens levied and assessed by the special improvement district upon the purchasers of the units should be reimbursed by appellants. It entered judgment against

appellants for the value of the construction defects and omissions as listed by the master, the sums set forth as direct overcharges for electric fixtures, and the sums representing the special improvement district levies, all together with interest and costs.

At the outset of our consideration of this appeal, we are met with the contention by appellants that the repeal of the Veterans Emergency Housing Act of 1946 by the Housing and Rent Act of 1947, 61 Stat. 193 (1947), deprived the Government of its right of action, both at law and in equity.

The Veterans Emergency Housing Act of 1946, 60 Stat. 207, enacted on May 22, 1946, created a housing expediter to insure an adequate supply of low cost housing accommodations for returning veterans by attempting to overcome shortages in building materials and accelerate home construction with preference to veterans. Priorities Regulation 33 had been issued by the Civilian Production Administration prior to the enactment of the Veterans Emergency Housing Act of 1946; the Housing Expediter under the 1946 Act continued the regulation in force until December 31, 1947.

On June 30, 1947, Congress repealed all of the 1946 Act, except for certain minor provisions not material here. The repealing statute, the Housing and Rent Act of 1947, 61 Stat. 193 (1947), provided in Sec. 1(a):

> 'Sections 1, 2(b) through 9, and sections 11 and 12, of Public Law 388, Seventy-ninth Congress, are hereby repealed, and any funds made available under said sections of said Act not expended or committed prior to the enactment of this Act are hereby returned to the Treasury: Provided, That any allocations made or committed, or priorities granted for the delivery, of

any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of enactment of this Act, with respect to veterans of World War II, their immediate families, and others, shall remain in full force and effect.'

It is urged that Priorities Regulation 33 became ineffective with the repeal of the 1946 Act, and that all rights of action under the 1946 Act ceased upon its repeal, save the allocations and priorities expressly excepted by the repealing proviso. Consequently, it is argued, this action brought by the Government on October 8, 1948, after the repeal, did not state a cause of action.

Appellants' position is that the limited savings clause in the repealing statute, together with the change in policy from having maximum price protection for veterans housing as in the 1946 Act to no price restrictions as in the 1947 Act, necessarily imply that the rights and remedies accruing under the 1946 Act were abated by repeal in 1947, except for the allocations and priorities mentioned in the savings clause.

They conceded, however, in their answers that the dwelling units in question were sold before the repeal of the 1946 Act on June 30, 1947, so that the only question presented is whether the right of actions arising upon the sale of the units abated upon the repeal of the Act.

United States v. Fortier et al, 1951, 342 U.S. 160, 72 S. Ct. 189, 96 L. Ed. 179, cited by appellants in support of their position, held that houses sold after the repeal of the Veterans Emergency Housing Act of 1946 were not subject to maximum price stipulations made under Priorities Regulation 33. The question presented on this ap-

peal as to houses sold while the statute was in effect was not passed upon.

The general savings statute found that 1 U.S.C.A. Sec. 109, authorizing the enforcement of causes of action arising prior to the repeal of statutes subsequent to such repeal, preserved the Government's right of action under the 1946 Act and Priorities Regulation 33. The presence of the limited savings clause in the repealing provision, nor the change in Congressional price protection policy, do not exclude either expressly or by implication the effect of the general savings statute. United States v. Carter, 5 Cir., 1948, 171 F.2d 530; Pruitt v. Litman, 89 F. Supp. 705 (E.D. Pa., 1949); United States v. Tyler Corporation, 90 F. Supp. 395 (E.D. Va., 1949); Rheinberger v. Reiling, 89 F. Supp. 598 (D. Minn., 1950); United States v. Fortier et al, 1951, Footnote 3, 342 U.S. 160, 72 S. Ct. 189, 96 L. Ed. 179; contra, Sevidy v. Superior Homes Builders, 7 Cir., 1951, 188 F.2d 729 (dictum).

Appellants contend that Sec. 944.54(g)(ii) of Priorities Regulation 33 read in pari materia with the rest of the Regulation and viewed with the policy of the 1946 Act, indicates that the term 'improvements' has reference to accommodations constructed by the builder with the use of priority materials. Hence, they urge there can be no liability upon appellants for the special assessment improvements in which materials obtained without priority ratings were used.

Appellants represented to the Government that street and utility improvements would be installed by them and included in the sales price, and that purchasers of the units would not be required to pay any special assessments. The Housing Expediter was empowered in Sec. 2 of the Veterans Emergency Housing Act of 1946 to

issue regulations necessary to the exercise of his powers, and priorities Regulation 33 was within the purview of the statute. Sec. 944.54(e) of Priorities Regulation 33 provided that the builder must do the work in accordance with the description given in his application. Appellants were bound by their representation that street and utility improvements would be included in the sales price, and no special assessments would be levied upon the purchasers. The special master found that the maximum authorized sales price of $8,000 was intended by the parties to include the special improvements for which the special taxes were levied. The District Court adopted this finding, and there being sufficient evidence to support the finding, we are required to follow it.

The units were conveyed by warranty deeds to the purchasers prior to the attachment of the special improvement liens, and the levy fell solely upon the purchasers. Consequently, appellants urge no liability can be enforced against themselves for the assessments. We do not agree. The maximum sales price was to include all of the items included in the special assessment levy, and the purchasers who were required to pay in excess of the maximum sales price because of appellants' failure to perform their contract should be reimbursed for the sum paid to satisfy the liens.

Appellants rely upon a favorable Compliance Inspection Report made by an F.H.A. Building Inspector on October 29, 1947, who certified that 'Building improvements acceptably completed.' The purpose of the inspection, as indicated by the F.H.A. form, as well as the date of inspection being after the repeal of the 1946 Act, was to enable the builder to obtain F.H.A. insurance.

Although the Compliance Inspection Report indicated acquiescence in the deviations, the United States was not bound by the unauthorized approval of its agent, who was bound to follow Sec. 944.54(e) of Priorities Regulation 33, requiring written approval upon application of the builder for changes in plans from those specified in the original application. See United States v. Austin, 100 F. Supp. 33, 42 (D.Md., 1951).

Affirmed.

(Endorsed:) Opinion. Filed May 23, 1957.

Paul P. O'Brien, Clerk.

No. 15145

2. JUDGMENT

United States Court of Appeals for the Ninth Circuit

A. W. HARTWIG and JEFF TINGLE, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the District of Montana, Billings Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana, Billings Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and Entered: May 23, 1957

PAUL P. O'BRIEN, Clerk

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No. 515

In the Supreme Court of the United States

OCTOBER TERM, 1957

A. W. HARTWIG AND JEFF TINGLE,
PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply Brief of Petitioners

STERLING M. WOOD,
Attorney for Petitioners
Billings, Montana

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 515

A. W. HARTWIG AND JEFF TINGLE, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Reply Brief of Petitioners

I.

Counsel for the Government, in their brief herein just served and filed, and at the outset of their argument therein, state:—

> "1. (a) Petitioners' first and main argument is that the repeal of the 1946 Act by the 1947 Act extinguished the liability which had arisen under the earlier act. They argue that, since the 1947 Act provided specifically for the preservation of certain rights, the General Savings Statute, quoted *infra*, is

by necessary implication rendered inapplicable. This argument has been rejected by various lower federal courts."

With entire respect for such counsel, the various lower courts mentioned have not rejected the argument in question. On the contrary those courts do not mention, in the decisions cited, the contention made by Petitioners herein that, considering the 1947 Housing and Rent Act as a whole, and particularly the proviso therein, as must be done under cited decisions of this Court, it appears by plain implication therefrom, as a matter of law, that the said proviso sets forth the only rights left in effect under the Emergency Housing Act of 1946 by the said 1947 Act of repeal, and, hence, that the so-called general savings statute is inapplicable in the case at bar. For the convenience of this Court we quote again, and briefly, from the Hertz case (208 U.S. 452) which sets forth clearly the applicable law in the premises, to-wit:—

> "As the section of the Revised Statute in question (meaning the so-called general savings statute) has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested *either expressly or by necessary implication* (the italics are ours) in a subsequent enactment. But while this is true, the provisions of Section 13 (the said general savings statute) are to be treated as incorporated in and as a part of subsequent enactments, and therefore, under the general principles of construction requiring, if possible, that effect be given to all parts of a law, the section must be enforced unless, *either by express declaration or necessary implication, arising from the terms of the law as a whole,* (the italics are ours) it results that the legislative mind will be set at naught by giving effect to the provisions of Section 13 *****."

Then, continuing, this Court has the following to say in the Hertz case, to-wit:

> "The repealing Act here involved includes *a saving clause, and if it necessarily, or by clear implication* (the italics are ours), conflicts with the general rule declared in Section 13, the latest expression of the legislative will must prevail ****. The significance of Section 13 is therefore this: That if, prior to the repealing act, the defendants in error were under any liability or obligation **** that obligation or liability was not relieved by the mere repeal of that section, nor as a consequence of the *saving clause* (the italics are ours) in the repealing act, *unless the special character of that clause, by plain implication,* (the italics are ours) cuts down the scope and operation of the general rule in Section 13."

The lower courts whose decisions are cited by counsel for the Government do not consider or mention the doctrine of *implication* above mentioned but stand upon the ground only, contrary to the decisions of this Court, that *express language* in a repealing act is required in order to repeal pre-existing remedies under the repealed act and that otherwise the said general saving statute is operative and preserves those remedies. Nor do any of the other decisions cited by counsel for the Government operate to reject the said contention of the Petitioners herein.

Thus, to repeat to some extent, but briefly, the conclusions expressed in Petitioners' original brief herein, the law is that, giving effect to the 1947 Housing and Rent Act, as a whole, and considering what members of Congress must be charged with knowing when the 1947 Act was enacted into law, the plain *implication* of the proviso, which Congress put into the 1947 Act, is that

the proviso sets forth the only rights and remedies left in effect by the repealing act and that all other rights and remedies under the 1946 Act, existing before its repeal, ended June 30, 1947. To contend to the contrary would be to charge Congress with doing an absurd thing in putting the proviso into the said Act, which may not be done under settled rules of law. It follows, therefore, that the general saving statute has no application whatsoever in the case at bar and that the claimed rights, made the basis of the amended complaint of the Government herein, were extinguished by the 1947 Act and did not exist when this action was brought in 1948.

II.

Only one further matter will be discussed in this reply brief, and this by way of amplification of the concluding argument in Subdivision 3, pages 16 and 17, of Petitioners' initial brief herein.

First of all counsel for the Petitioners feels he should say to this Court that the quotation from Priorities Regulation 33 set forth upon page 16 of the Petitioners' initial brief herein was taken from the Federal Register bearing date, at Washington, D. C., of January 15, 1946, and with the understanding and belief of such counsel and their clients that the quoted clause was effective when the construction work was done by the Petitioners that is involved in this litigation. If, however, that clause was amended later and applies to the construction work done by the Petitioners, they were ignorant of that fact; but, nevertheless, it is submitted that the amendment—

set forth as paragraph 944.54(e) on page 12 of the brief of the Government herein—does not change the contention of the Petitioners as set forth in Subdivision 3 of their initial brief herein. In other words, the Petitioners contend that "written approval" was given by the F.H.A. for the changes made in construction, and, so contending, the Petitioners stand squarely upon Exhibit No. 20, set forth in the Book of Exhibits in the Court of Appeals for the Ninth Circuit in this case, and which is a part of the transcript of record. That exhibit appears upon page 378 of the said Book of Exhibits. As the Court will see, it is a written Compliance Inspection Report given to the Petitioners and is duly and appropriately signed by Federal Housing Administration officials. That exhibit recites that building improvements have been acceptably completed. It furthermore sets forth that the construction examiner, who signed the document, certifies he has carefully inspected the property on the date of his certificate and that he has reported all substantial variations from the approved drawings and description of materials, specific conditions of the commitment and applicable requirement; and then nothing whatsoever is set forth in this compliance construction report by way of variations from the approved drawings, etc. In other words, *the Compliance Inspection Report is a complete approval in writing* of the work the Petitioners have done under their contract herein with the F.H.A. Thus, there is no basis in the case at bar for the claim of the Government in its amended complaint

that the buildings involved were not constructed and completed as required. Upon this ground alone the Court of Appeals for the Ninth Circuit erred in the rendition of its judgment herein at which petition to this Court for a writ of certiorari is directed.

For all the reasons set forth herein, and in Petitioners' original brief filed in this Court, it is respectfully submitted that the petition for writ of certiorari herein should be granted.

STERLING M. WOOD
Attorney for Petitioners

November, 1957

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulation involved	2
Statement	2
Argument	3
Conclusion	9
Appendix	10

CITATIONS

Cases:	
Allen v. *Grand Central Aircraft Co.*, 347 U. S. 535	4
Federal Crop Ins. Corp. v. *Merrill*, 332 U. S. 380	8
Great Northern Ry. Co. v. *United States*, 208 U. S. 452	4, 7, 8
Hertz v. *Woodman*, 218 U. S. 205	7
Pruitt v. *Litman*, 89 F. Supp. 705	4
Territory of Alaska v. *American Can Co.*, 137 F. Supp. 181, affirmed, 246 F. 2d 493	5, 6
United States v. *Carter*, 171 F. 2d 530	4
United States v. *Fortier*, 342 U. S. 160	4
United States v. *Tyler Corp.*, 90 F. Supp. 395	4
Whiteside et al. v. *United States*, 93 U. S. 247	8
Statutes and Regulation:	
General Savings Statute, 1 U. S. C. 109	2, 4, 5, 6, 7, 8, 11
Housing and Rent Act of 1947, 61 Stat. 193, 50 U. S. C. 1881 (Supp. V, 1946 ed.):	
Section 1 (a)	2, 3, 5, 11
Veterans' Emergency Housing Act of 1946, 60 Stat. 207	2, 3, 5, 10
Section 3 (b)	10
Section 4 (a)	10
Section 5	10
Section 8	11
Section 8 (a)	11
Priorities Regulation 33, 11 Fed. Reg. 601, Section 944.54 (e)	9
Priorities Regulation 33, as amended, 11 Fed. Reg. 4085 (1946)	2, 5, 12
Section 944.54 (e)	8, 9, 12
Section 944.54 (g) (2) (ii)	12

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 515

A. W. HARTWIG AND JEFF TINGLE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the District of Montana, not reported, appear at R. 206–222. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 386–392) is reported at 244 F. 2d 849.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1957 (Pet. App. 28). A petition for rehearing, timely filed, was denied on July 8, 1957 (R. 394). The petition for writ of certiorari was filed on September 30, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the repeal of the Veterans' Emergency Housing Act of 1946, 60 Stat. 207, by the Housing and Rent Act of 1947, 61 Stat. 193, 50 U. S. C. 1881 (Supp. V, 1946 ed.), relieved the petitioners of liability for defects and deficiencies in houses built with priorities-assistance granted pursuant to the 1946 Act, and sold before its repeal.

2. Whether petitioners are relieved of such liability by virtue of an FHA agent's approval of the project in a "Compliance Inspection Report" (R. 378).

STATUTES AND REGULATION INVOLVED

Pertinent portions of the Veterans' Emergency Housing Act of 1946, 60 Stat. 207, of Section 1 (a) of the Housing and Rent Act of 1947, 61 Stat. 193, 50 U. S. C. 1881 (a) (Supp. V, 1946 ed.), of the General Savings Statute, 1 U. S. C. 109, and of Priorities Reg. 33, as amended, 11 Fed. Reg. 4085 (1946), are set forth in the Appendix, *infra*, pp. 10–12.

STATEMENT

The United States instituted this action against petitioners to compel them to compensate certain purchasers for deficiencies in dwelling units constructed and sold by petitioners subject to the requirements of the Veterans' Emergency Housing Act of 1946, *infra*, and the Priorities Regulation, *infra*, adopted pursuant thereto.

The 1946 Act and the Regulation together provided that priorities in the allocation of building materials were to be granted to contractors who would build dwelling units for veterans at agreed maximum prices.

Petitioners applied for and received priorities from the FHA on or about July 1, 1946, for the construction of twenty-seven houses, at a maximum sales price of $8,000.00 each. The petitioners received building materials through use of the priorities, constructed twenty-five houses, and sold them at the maximum price. After these houses had been sold, the 1946 Act was repealed by the Housing and Rent Act of 1947, *infra*.

Thereafter, it was discovered that the purchasers were being charged for certain improvements which were intended to be included within the agreed price,[1] and that the houses failed to conform to specifications in various respects. The United States instituted the present action to compel petitioners to make appropriate compensation (or provide certain alternative remedies) to the purchasers. The district court ordered compensation (R. 223–226), and this order was affirmed by the court of appeals (R. 385–392).

ARGUMENT

1. (a) Petitioners' first and main argument is that the repeal of the 1946 Act by the 1947 Act extinguished the liability which had arisen under the earlier act. They argue that, since the 1947 Act provided specifically for the preservation of certain rights, the

[1] Petitioners contended below that these improvements were not intended to be included in the specifications which were the basis of the maximum price. This contention was rejected (R. 158) by a special master who had been appointed by the district court after the court of appeals had remanded for further findings. 209 F. 2d 604. The master's findings in this regard were adopted by the district court (R. 208) and affirmed by the court of appeals, and are not now in issue.

General Savings Statute, quoted *infra*, is by necessary implication rendered inapplicable. This argument has been rejected by various lower federal courts. *United States* v. *Carter*, 171 F. 2d 530 (C. A. 5); *United States* v. *Tyler Corp.*, 90 F. Supp. 395 (E. D. Va.); *Pruitt* v. *Litman*, 89 F. Supp. 705 (E. D. Pa.).[2] Similar arguments based on other statutes frequently have been rejected by this Court. *E. g.*, *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 553–555; *Great Northern Ry. Co.* v. *United States*, 208 U. S. 452.

(b) Each of the cases cited above has recognized and applied the principle that Congress, in the General Savings Statute, established the overriding policy that violators of statutes are not to be insulated from liability by expiration or repeal of the statute under which the violation accrued.[3] The impact of this

---

[2] It should be noted that the petitioners' liability had crystallised prior to repeal of the 1946 Act because all the houses had been sold prior to repeal. Thus, this case is the converse of *United States* v. *Fortier*, 342 U. S. 160, where, in otherwise similar circumstances, the builder was absolved of liability because the houses had been sold *after* repeal. The opinion in that case plainly implies that if the houses had been sold before repeal the General Savings Statute would have preserved the right of action.

[3] There is no merit whatsoever to petitioners' suggestion that the General Savings Statute does not reach and preserve liabilities arising under regulations issued pursuant to statute. The language of this Court in *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 554–555, suffices to put any such contention at rest:

"The precise object of the general savings statute is to prevent the expiration of a temporary statute from cutting off appropriate measures to enforce the expired statute in relation to violations of it, *or of regulations issued under it*, occurring before its expiration." (Emphasis added.)

general policy can be avoided only by demonstration that Congress has expressly created an exception. No such showing can be made in this case. On the contrary, petitioners' argument, based on Section 1 (a) of the 1947 Act, is not of sufficient dignity to give rise to any difficult problem of construction. Even a superficial reading of that section clearly indicates that it does not deal with the same problem covered by the General Savings Statute.

The general statute preserves causes of action for "any penalty, forfeiture, or liability." *Infra*, p. 11. The proviso in the 1947 Act, on the other hand, preserves "* * * allocations made or committed, or priorities granted for the delivery, of any housing materials or facilities under any regulation or order issued * * *" under the 1946 Act. In other words, the General Savings Statute continues in existence the power to enforce against accrued violations of the 1946 Act and Regulation. The proviso in the 1947 Act preserves veterans' existing rights to priorities for building materials. Comparing these statutory provisions and their respective purposes, it can hardly be said that the necessary implication of the 1947 proviso is to render inapplicable the General Savings Statute.

Petitioners place great reliance on *Territory of Alaska* v. *American Can Co.*, 137 F. Supp. 181 (D. Alaska), affirmed, 246 F. 2d 493 (C. A. 9). That case involved property taxes which were to be collected by the Territory with the exception that taxes on property located within the bailiwick of "incorporated cities, school districts and public utility districts"

were to be collected and retained by those entities. 137 F. Supp. at 182. The taxing statute was repealed by an act which saved "any taxes which have been levied and assessed by any municipality, school or public utility district * * *." *Ibid.* The court considered that this provision was by clear implication exclusive of all other savings provisions. Thus, the court held that a general savings provision (similar to the General Savings Statute) could not be applied to preserve the right of the Territory to collect taxes which had accrued prior to repeal. To the extent that this decision is in conflict with the decisions of this Court and other federal courts, set forth on p. 4, *supra,* as to the overriding effect of the General Savings Statute, we believe it to be wrong. But, in any event, there is a vast difference between the *American Can* case and the case at bar in that the specific savings provision considered in the former case dealt with the same subject matter (the preservation of liability for taxes) to which the plaintiff sought to apply the general provision, whereas, as we have demonstrated (p. 5, *supra*), the specific provision in the instant case is unrelated to the matter to which the general provision has been applied.

(c) Petitioners' assertion of a conflict between the decision of the lower court and prior decisions of this Court is also without foundation. In each of the two cases cited by petitioners it was urged, as petitioners now urge, that the General Savings Statute (now Section 109) had been rendered inapplicable because

of a specific savings clause in the repealing statute. But in one case, *Great Northern Ry. Co.* v. *United States,* 208 U. S. 452, the contention was *rejected* by this Court, as it has been by the lower court in the present case. And in the other, *Hertz* v. *Woodman,* 218 U. S. 205, a decision as to that contention was rendered unnecessary by virtue of a ruling as to a preliminary argument.

In the *Hertz* case, an estate tax had been imposed by statute. This tax was repealed by a statute which provided that taxes which had been "imposed" before repeal remained subject to collection. The defendant-executor had refused to pay the tax, arguing that although his decedent had died before repeal the tax had not been "imposed" because it was not payable until after repeal. Apparently it was further argued that, since the repealer had contained a specific savings clause, the general savings clause must be considered inapplicable. The present petitioners cite language in which the latter argument was considered. But the Court held that the tax in question had been saved by the specific provision in the repealer. Hence, the possible conflict with the General Savings Statute (the forerunner of Section 109) was eliminated.

In the *Great Northern* case, petitioners had been convicted of granting illegal rebates on freight charges. The statute under which they had been convicted had been replaced, after the rebates were granted but before indictment, by an act which provided:

> * * * That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in the courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law. [208 U. S. at 466.]

The Court rejected the contention that this provision necessarily implied that liability was preserved only as to matters then the subject of pending actions. It held that the General Savings Statute had properly been applied.

2. Petitioners' remaining contention is that they were absolved of all liability by a final "Compliance Inspection Report." (R. 378.) This report indicates that "[b]uilding improvements [were] acceptably completed." Petitioners seem to argue that, since it was within the authority of the FHA inspector to make this report, the "acceptance" of the project is binding on the United States. The court of appeals held that "the United States was not bound by the unauthorized approval of its agent, who was bound to follow § 944.54 (e) of Priorities Regulation 33, requiring written approval upon application of the builder for changes in plans from those specified in the original application." 244 F. 2d at 854. See Priorities Regulation 33, § 944.54 (e), quoted *infra*. This conclusion follows from the well-established proposition that the United States is not bound by the unauthorized acts of its officers and agents. See, *e. g.*, *Federal Crop Ins. Corp.* v. *Merrill*, 332 U. S. 380; *Whiteside et al.* v. *United States*, 93 U. S. 247. Petitioners seek

to avoid the court's unassailable result by asserting that the court erroneously quoted (244 F. 2d at 850) the relevant regulation requiring written approval for deviation from the original plans. It is the petitioners who err, not the court. The petitioners rely on the regulation, Section 944.54 (e), as it appeared at 11 Fed. Reg. 601, 602. The amended regulation cited by the court appeared at 11 Fed Reg. 4085 on April 13, 1946—before the inspector's report and before any other act relevant to this case. Thus, the court of appeals was clearly correct in its conclusion in this regard.

Moreover, the court of appeals reasonably found that the purpose of the report was not to accept the project so as to relieve petitioners of liability for deficiencies, but rather merely to enable them to obtain FHA insurance (244 F. 2d at 854).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
Attorney.

NOVEMBER 1957.

APPENDIX

The Veterans' Emergency Housing Act of 1946, 60 Stat. 207, provided, in pertinent part, as follows:

* * * * *

SEC. 3 (b) Any regulation or order issued under the authority of this section with respect to housing accommodations * * * shall provide that no sale of any such housing accommodations shall take place until after the builder thereof has filed * * * a description of such accommodations, including a statement of the proposed maximum sales price * * *.

* * * * *

SEC. 4 (a) Whenever in the judgment of the Expediter there is a shortage in the supply of any materials or of any facilities suitable for the construction and/or completion of housing accommodations * * * he may by regulation or order allocate, or establish priorities for the delivery of, such materials or facilities in such manner, upon such conditions, and to such extent as he deems necessary and appropriate in the public interest and to effectuate the purposes of this Act.

* * * * *

SEC. 5. It shall be unlawful for any person to effect, either as principal or broker, a sale of any housing accommodations at a price in excess of the maximum sales price applicable to such sale under the provisions of this Act, or to solicit or attempt, offer, or agree to make any such sale. It shall be unlawful for any person to violate the terms of any regulation or order issued under the provisions of this Act. * * *

* * * * *

SEC. 8. As used in this Act—

(a) The term "maximum sales price" means the maximum price for which any housing accommodations the construction of which is completed after the effective date of this Act may be sold and includes the total consideration which may be paid by the buyer for such housing accommodations with accompanying land and improvements * * *.

* * * * *

Section 1 (a) of the Housing and Rent Act of 1947, 61 Stat. 193, 50 U. S. C. 1881 (a) (Supp. V, 1946 ed.), provides that all presently relevant sections of the Veterans' Emergency Housing Act of 1946, *supra*,

> * * * are hereby repealed, and any funds made available under said sections of said Act not expended or committed prior to the enactment of this Act are hereby returned to the Treasury; *Provided*, That any allocations made or committed, or priorities granted for the delivery, of any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of enactment of this Act, with respect to veterans of World War II, their immediate families, and others, shall remain in full force and effect.

The General Savings Statute, 1 U. S. C. 109, provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. * * *

Priorities Reg. 33, as amended, 11 Fed. Reg. 4085 (1946) was adopted pursuant to the Veterans' Emergency Housing Act of 1946, *supra*.

§ 944.54 (e) provided:

Construction of the project. A builder who constructs, converts, alters or repairs housing accommodations under this regulation must do the work in accordance with the description given in the application, *except where he has obtained written approval* for a change from the agency which approved the original application. [Italics added.]

§ 944.54 (g) (2) (ii) provided:

A builder must not sell a one-family dwelling built or converted under this regulation, including the land and all improvements (including garage if provided), for more than the maximum sales price specified in the application, as approved, including within this sales price the amount of any brokerage fees or commissions paid in connection with the sale, whether paid by the builder or by the purchaser.

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